Gumusut-Kakap Semi-Floating Production System (Labuan) Ltd v Sabah Shell Petroleum Co Ltd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(IM)(C)-124–01 OF 2023 AND W-02(C)(A)-125–01 OF 2023

CHE MOHD RUZIMA, WONG KIAN KHEONG AND ONG CHEE KWAN JJCA

5 DECEMBER 2025

Arbitration — Arbitral tribunal ('AT') — Jurisdiction — Contract between company and contractor contained clause limiting latter's liability to former — AT awarded company damages against contractor in excess of sum specified in limitation of liability clause — Whether AT had thereby acted in excess of jurisdiction and its award was liable to be set aside under s 37 of Arbitration Act 2005 ('the AA') — Whether limitation of liability clause limited AT's jurisdiction to award damages or merely went to merits of claim between the parties — Whether AT's interpretation of said clause, even if erroneous, was not reviewable by court — Whether court had discretionary power under ss 37 and 39 of the AA to sever award such that contractor was only liable up to limit of its liability under the contract — Whether limit of liability clause had to be given business common sense interpretation

Pursuant to arbitration proceedings instituted by the appellant ('GKL') against the respondent ('SSPC') with regard to a contractual dispute between them, a three-member arbitral tribunal awarded, inter alia, damages in favour of SSPC against GKL that exceeded GKL's limit of liability as specified under article 34.3 of the contract between the parties. Contending that the arbitral tribunal exceeded its jurisdiction when its award breached the limit of liability clause, GKL applied to the High Court under s 37 of the Arbitration Act 2005 ('the AA') to set aside the award as well as an ex parte order SSPC had obtained to enforce the award. The two appeals herein were against the High Court's dismissal of GKL's aforesaid applications. The majority of the Court of Appeal differed from the minority solely on the question whether the arbitral tribunal exceeded its jurisdiction when it awarded damages in excess of the limitation of liability clause in the contract.

Held, by majority, allowing GKL's appeals in part and varying the arbitral tribunal's award:

(1) **(per Wong Kian Kheong JCA, majority)** A business common sense construction of articles 34.2 and 34.3 of the contract between the parties clearly imposed a maximum limit of liability of USD200m on the part of

GKL to SSPC, save for certain exceptions. The court exercised its discretion to sever the award in accordance with ss 37(3) and 39(3) of the AA so as to confine the amount to be paid by GKL to SSPC to an aggregate sum of USD200m. This was due to the fact that the parties had expressly agreed to GKL's maximum quantum of liability after extensive negotiations at arm's length with regard to the high risks involved in the extraction of crude oil from the sea bed (see paras 23 & 31).

(2) **(per Wong Kian Kheong JCA, majority)** GKL was bound to pay pre-award and post-award interest on the USD200m at the rate specified in the arbitral award. Accordingly, the sum of RM84,844,266.64 stated to be payable by GKL as pre-award interest in the arbitral award had to be varied (see paras 31 & 34).

(3) **(per Wong Kian Kheong JCA, majority)** Premised on *Thai-Lao Lignite Co Ltd & Anor v Government of The Lao People's Democratic Republic* [2017] MLJU 1196, *Garden Bay Sdn Bhd v Sime Darby Property Bhd* [2021] 2 MLJ 281, *Magna Prima Construction Sdn Bhd v Bina BMK Sdn Bhd and another case* [2015] 11 MLJ 841 and *PT Prima International Development v Kempinski Hotels SA and other appeals* [2012] SCD 179; [2012] 4 SLR 98, in deciding the 'terms of the submission to arbitration' and 'scope of the submission to arbitration' under ss 37(1)(a)(iv)(v) and 39(1)(a)(iv)(v) of the AA, the court shall consider the pleadings of the parties. In its reply and defence to counterclaim ('RDCC') GKL had asserted that its liability was limited to USD200m. That contention was denied by SSPC in its rejoinder which repeated a counterclaim in excess of USD200m. Based on GKL's RDCC and SSPC's rejoinder, the terms and scope of the submission to arbitration included, amongst others, the requirement that SSPC's counterclaim should be limited to USD200m by article 34.3 of the contract (see paras 21 & 27–29).

(4) **(per Wong Kian Kheong JCA, majority)** The arbitral tribunal's award had dealt with a dispute not contemplated by or not falling within the terms of submission to the arbitration and had decided on a matter beyond the scope of submission to the arbitration. The High Court erred in not perusing GKL's RDCC and SSPC's Rejoinder so as to ascertain the terms and scope of submission to the arbitration with regard to GKL's limit of liability under the contract (see para 31).

(5) **(per Wong Kian Kheong JCA, majority)** Sections 30(4A) and (5) of the AA were not relevant in the exercise of the court's discretionary power under s 37(1)(a)(iv)(v) and (3) and s 39(1)(a)(iv)(v) and (3) of the AA. This was because Parliament had not provided for the latter provisions to be subject to the former. Furthermore, s 37 was placed under Chapter 7 of the AA (Recourse against award) and s 39 under Chapter 8 (Recognition and enforcement of awards) whereas s 30 was placed under

Chapter 6 (Making of Award and Termination of Proceedings) (see para 21).

(6) **(per Ong Chee Kwan JCA, dissenting)** There was no basis to suggest that the parties had intended by the arbitration agreement (article 36) in the contract to limit the arbitral tribunal's jurisdiction to award damages to only the sum stated in article 34.3. The parties had not made article 34.3 a jurisdictional limiting clause at all. Hence, the contention that the arbitral tribunal exceeded its jurisdiction when it awarded damages in excess of USD200m was wholly without merit and was rejected (see paras 124–125).

(7) **(per Ong Chee Kwan JCA, dissenting)** Recognising that the arbitral tribunal had jurisdiction to decide on the limitation of liability clause, the parties had made their respective submissions to the arbitral tribunal on the interpretation, scope and application of article 34.3. This effectively turned the dispute on article 34.3 into one of merits and an issue of interpretation and not jurisdiction. Once the parties had put the limitation of liability clause in issue, its meaning and effect was part of the matters submitted to the arbitration. This meant the arbitral tribunals ruling on article 34.3, whether correct or erroneous, was an exercise of jurisdiction and not in excess of jurisdiction at all. Having submitted fully on the merits, the appellant could not now claim that article 34.3 was a jurisdictional bar on the arbitral tribunal and that the award was made in excess of jurisdiction (see paras 106–109).

(8) **(per Ong Chee Kwan JCA, dissenting)** In interpreting article 34.3 of the contract, the arbitral tribunal had found that the work claims did not fall within the categories specified in article 34.3 and were therefore not subject to the limitation of liability clause. The appellant had expressly agreed at the outset to accept the arbitral tribunal's finding of law as final and binding. Any error of interpretation of article 34.3 by the arbitral tribunal was an error made within jurisdiction and therefore s 37(1)(a)(iv) and (v) of the AA had no application at all (see paras 111–112 & 114).

(9) **(per Ong Chee Kwan JCA, dissenting)** The appellant's invitation to the court to review the correctness or otherwise of the arbitral tribunal's interpretation of article 34.3 in the interests of fairness and justice was tantamount to asking the court to act beyond what was permitted by the AA. The AA did not provide for a general appeal on a point of law and the courts could not review the merits of an arbitral tribunal's decision under the guise of a jurisdictional challenge. The parties themselves had expressly agreed to exclude the court exercising such review powers on a question of law. Even if the limitation of liability clause was wrongly interpreted, it was an interpretational error and not a jurisdictional defect (see paras 113, 115 & 117–118).

(10) **(per Ong Chee Kwan JCA, dissenting)** Errors of law or fact made by the arbitral tribunal were still within its jurisdiction and the courts would not interfere because the arbitral tribunal's awards were meant to be final (see ss 36 and 46 of the AA 2005) whereas decisions made exceeding jurisdiction, being made without the authority given by the parties, might be set aside under s 37(1)(a)(iv) and (v) of the AA (see para 92).

(11) **(per Ong Chee Kwan JCA, dissenting)** An exclusion or limitation of liability clause was a substantive defence available to the parties to the contract. It served to govern the extent of liability of the parties and did not cut into the jurisdiction of the arbitral tribunal unless the arbitration agreement itself expressly or otherwise limited the arbitral tribunal's jurisdiction to award damages up to a certain maximum sum. A substantive interpretative error of the clause was not a jurisdictional defect because the tribunal's jurisdiction flowed from the arbitration agreement and not from the limitation clause (see paras 98 & 100).

(12) **(per Ong Chee Kwan JCA, dissenting)** The High Court correctly found that GKL's setting-aside applications had no merit as it was not established that the arbitral tribunal had acted in excess of jurisdiction and/or had denied GKL of natural justice and/or had made an award that conflicted with the public policy of Malaysia. The High Court correctly found that the complaints advanced by GKL were actually an appeal against the award. In these appeals, GKL clearly sought to reopen, rehash and re-argue the issues in the arbitration, which was not permissible in the circumstances of this case (see paras 233–234).

[Bahasa Malaysia summary

Susulan prosiding timbang tara yang dimulakan oleh perayu ('GKL') terhadap responden ('SSPC') mengenai suatu pertikaian kontrak antara mereka, sebuah tribunal timbang tara yang terdiri daripada tiga orang ahli telah menganugerahkan, antara lain, ganti rugi memihak kepada SSPC terhadap GKL yang melebihi had liabiliti GKL sebagaimana diperuntukkan di bawah perkara 34.3 kontrak antara pihak-pihak. Dengan menegaskan bahawa tribunal timbang tara telah melampaui bidang kuasanya apabila anugerah tersebut melanggar klausa had liabiliti, GKL telah memohon kepada Mahkamah Tinggi di bawah s 37 Akta Timbang Tara 2005 ('Akta 2005') untuk mengenepikan anugerah tersebut serta suatu perintah ex parte yang telah diperoleh oleh SSPC bagi tujuan penguatkuasaan anugerah berkenaan. Dua rayuan ini adalah terhadap keputusan Mahkamah Tinggi yang menolak permohonan-permohonan GKL tersebut. Majoriti Mahkamah Rayuan berbeza pendapat dengan minoriti hanya berhubung persoalan sama ada tribunal timbang tara telah melampaui bidang kuasanya apabila mahkamah menganugerahkan ganti rugi yang melebihi klausa had liabiliti dalam kontrak tersebut.

Diputuskan, dengan majoriti, membenarkan sebahagian rayuan-rayuan GKL dan meminda anugerah tribunal: A

(1) **(oleh Wong Kian Kheong HMR, majoriti)** Tafsiran berasaskan pertimbangan perniagaan yang munasabah ('business common sense') terhadap perkara 34.2 dan per 34.3 perjanjian antara pihak-pihak dengan jelas mengenakan had maksimum liabiliti sebanyak USD200 juta ke atas GKL terhadap SSPC, tertakluk kepada pengecualian-pengecualian tertentu. Mahkamah telah melaksanakan budi bicaranya untuk memisahkan anugerah tersebut selaras dengan ss 37(3) dan 39(3) Akta Timbang Tara 2005 bagi mengehadkan jumlah yang perlu dibayar oleh GKL kepada SSPC kepada suatu jumlah agregat sebanyak USD200 juta. Hal ini demikian kerana pihak-pihak telah secara nyata bersetuju terhadap kuantum maksimum liabiliti GKL selepas rundingan yang meluas tanpa hubungan kepentingan mengenai risiko tinggi yang terlibat dalam aktiviti pengekstrakan minyak mentah dari dasar laut (lihat perenggan 23 & 31). B C D

(2) **(oleh Wong Kian Kheong HMR, majoriti)** GKL adalah terikat untuk membayar faedah pra-anugerah dan pasca-anugerah ke atas jumlah USD200 juta pada kadar sebagaimana yang dinyatakan dalam anugerah timbang tara. Sehubungan itu, jumlah RM84,844,266.64 yang dinyatakan sebagai faedah pra-anugerah yang perlu dibayar oleh GKL dalam anugerah timbang tara tersebut hendaklah dipinda (lihat perenggan 31 & 34). E

(3) **(oleh Wong Kian Kheong HMR, majoriti)** Berpandukan kes *Thai-Lao Lignite Co Ltd & Anor v Government of The Lao People's Democratic Republic* [2017] MLJU 1196, *Garden Bay Sdn Bhd v Sime Darby Property Bhd* [2021] 2 MLJ 281, *Magna Prima Construction Sdn Bhd v Bina BMK Sdn Bhd and another case* [2015] 11 MLJ 841 dan *PT Prima International Development v Kempinski Hotels SA and other appeals* [2012] SCD 179; [2012] 4 SLR 98, dalam menentukan 'terms of the submission to arbitration' dan 'scope of the submission to arbitration' di bawah ss 37(1)(a)(iv)(v) dan 39(1)(a)(iv)(v) Akta Timbang Tara 2005, mahkamah hendaklah mengambil kira pliding pihak-pihak. Dalam jawapan dan pembelaan terhadap tuntutan balas ('JPTTB'), GKL telah menegaskan bahawa liabilitinya adalah terhad kepada USD200 juta. Hujahan tersebut telah dinafikan oleh SSPC dalam tindakan pencantumannya ('rejoinder') yang mengulangi tuntutan balas melebihi USD200 juta. Berdasarkan JPTTB GKL dan Pencantuman SSPC, terma dan skop penyerahan kepada timbang tara merangkumi, antara lain, keperluan bahawa tuntutan balas SSPC hendaklah dihadkan kepada USD200 juta selaras dengan perkara 34.3 perjanjian tersebut (lihat perenggan 21 & 27–29). F G H I

(4) **(oleh Wong Kian Kheong HMR, majoriti)** Anugerah tribunal timbang

tara telah menangani suatu pertikaian yang tidak disangka atau tidak termasuk dalam terma penyerahan kepada timbang tara serta telah memutuskan suatu perkara yang melampaui skop penyerahan kepada timbang tara. Mahkamah Tinggi telah terkhilaf apabila gagal meneliti JPTTB GKL dan Pencantuman SSPC bagi menentukan terma dan skop penyerahan kepada timbang tara mengenai had liabiliti GKL di bawah kontrak tersebut (lihat perenggan 31).

(5) **(oleh Wong Kian Kheong HMR, majoriti)** Seksyen 30(4A) dan (5) Akta Timbang Tara 2005 tidak relevan dalam pelaksanaan kuasa budi bicara mahkamah di bawah s 37(1)(a)(iv)(v) dan (3) serta s 39(1)(a)(iv)(v) dan (3) Akta tersebut. Hal ini demikian kerana Parlimen tidak memperuntukkan bahawa peruntukan-peruntukan yang kemudian itu tertakluk kepada peruntukan-peruntukan yang terdahulu. Tambahan pula, s 37 terletak di bawah Bab 7 Akta tersebut (Remedi terhadap anugerah) ('Recourse against award'), manakala s 39 berada di bawah Bab 8 (Pengiktirafan dan penguatkuasaan anugerah) ('Recognition and enforcement of awards'), sedangkan s 30 pula diperuntukkan di bawah Bab 6 (Pembuatan Anugerah dan Penamatan Prosiding) ('Making of Award and Termination of Proceedings') (lihat perenggan 21).

(6) **(oleh Ong Chee Kwan HMR, menentang)** Tiada asas untuk mencadangkan bahawa pihak-pihak telah berniat melalui perjanjian timbang tara (perkara 36) dalam perjanjian tersebut untuk mengehadkan bidang kuasa tribunal timbang tara supaya hanya boleh menganugerahkan ganti rugi setakat jumlah yang dinyatakan dalam perkara 34.3. Pihak-pihak sama sekali tidak menjadikan perkara 34.3 sebagai suatu klausa yang mengehadkan bidang kuasa. Oleh itu, hujahan bahawa tribunal timbang tara telah melampaui bidang kuasanya apabila menganugerahkan ganti rugi melebihi USD200 juta adalah sama sekali tidak bermerit dan ditolak (lihat perenggan 124–125).

(7) **(oleh Ong Chee Kwan HMR, menentang)** Dengan mengiktiraf bahawa tribunal timbang tara mempunyai bidang kuasa untuk memutuskan isu berkaitan klausa had liabiliti, pihak-pihak telah mengemukakan hujahan masing-masing kepada tribunal timbang tara mengenai tafsiran, skop dan pemakaian perkara 34.3. Hal ini telah menukarkan pertikaian mengenai perkara 34.3 kepada suatu isu merit dan isu tafsiran dan bukannya isu bidang kuasa. Setelah pihak-pihak meletakkan klausa had liabiliti sebagai isu untuk diputuskan, makna dan kesannya menjadi sebahagian daripada perkara yang diserahkan kepada timbang tara. Ini bermaksud bahawa keputusan tribunal timbang tara mengenai perkara 34.3, sama ada betul atau tersilap, merupakan suatu pelaksanaan bidang kuasa dan bukannya suatu tindakan melampaui bidang kuasa. Setelah berhujah sepenuhnya atas merit, perayu tidak

boleh kini menyatakan bahawa perkara 34.3 merupakan halangan bidang kuasa terhadap tribunal timbang tara dan bahawa anugerah tersebut telah dibuat melampaui bidang kuasa (lihat perenggan 106–109).

(8) **(oleh Ong Chee Kwan HMR, menentang)** Dalam mentafsir perkara 34.3 perjanjian tersebut, tribunal timbang tara telah mendapati bahawa *work claims* tidak termasuk dalam kategori-kategori yang diperuntukkan di bawah perkara 34.3 dan oleh itu tidak tertakluk kepada klausa had liabiliti. Perayu telah secara nyata bersetuju sejak awal untuk menerima dapatan undang-undang tribunal timbang tara sebagai muktamad dan mengikat. Sebarang kesilapan tafsiran perkara 34.3 oleh tribunal timbang tara merupakan suatu kesilapan yang dibuat dalam lingkungan bidang kuasa. Oleh itu, s 37(1)(a)(iv) dan (v) Akta Timbang Tara 2005 langsung tidak terpakai (lihat perenggan 111–112 & 114).

(9) **(oleh Ong Chee Kwan HMR, menentang)** Hujahan perayu kepada mahkamah untuk menilai semula sama ada tafsiran tribunal timbang tara terhadap perkara 34.3 adalah betul atau sebaliknya atas alasan keadilan dan kesaksamaan adalah bersamaan dengan memohon mahkamah bertindak melangkaui apa yang dibenarkan oleh Akta Timbang Tara 2005. Akta tersebut tidak memperuntukkan suatu rayuan umum atas persoalan undang-undang dan mahkamah tidak boleh menilai merit keputusan tribunal timbang tara dengan berselindung di sebalik cabaran bidang kuasa. Pihak-pihak sendiri telah secara nyata bersetuju untuk mengecualikan kuasa mahkamah daripada menjalankan semakan sedemikian ke atas persoalan undang-undang. Walaupun klausa had liabiliti itu telah ditafsirkan secara tersilap, kesilapan tersebut adalah kesilapan tafsiran dan bukannya kekurangan bidang kuasa (lihat perenggan 113, 115 & 117–118).

(10) **(oleh Ong Chee Kwan HMR, menentang)** Kesilapan undang-undang atau fakta yang dilakukan oleh tribunal timbang tara masih berada dalam lingkungan bidang kuasanya dan mahkamah tidak akan campur tangan kerana anugerah tribunal timbang tara bertujuan untuk menjadi muktamad (lihat ss 36 dan 46 Akta Timbang Tara 2005), manakala keputusan yang dibuat melampaui bidang kuasa, iaitu tanpa kuasa yang diberikan oleh pihak-pihak boleh diketepikan di bawah s 37(1)(a)(iv) dan (v) Akta tersebut (lihat perenggan 92).

(11) **(oleh Ong Chee Kwan HMR, menentang)** Klausa pengecualian atau had liabiliti merupakan suatu pembelaan substantif yang boleh digunakan oleh pihak-pihak dalam kontrak. Klausa sedemikian berfungsi untuk mengawal tahap liabiliti pihak-pihak dan tidak menjejaskan bidang kuasa tribunal timbang tara melainkan perjanjian timbang tara itu sendiri secara nyata atau sebaliknya mengehadkan bidang kuasa tribunal timbang tara untuk menganugerahkan ganti rugi

sehingga suatu jumlah maksimum tertentu. Suatu kesilapan tafsiran substantif terhadap klausa tersebut bukanlah suatu kekurangan bidang kuasa kerana bidang kuasa tribunal berpunca daripada perjanjian timbang tara dan bukannya daripada klausa had liabiliti itu sendiri (lihat perenggan 98 & 100).

(12) **(oleh Ong Chee Kwan HMR, menentang)** Mahkamah Tinggi adalah betul dalam mendapati bahawa permohonan-permohonan pengenepian oleh GKL adalah tidak bermerit kerana tidak dibuktikan bahawa tribunal timbang tara telah bertindak melampaui bidang kuasa dan/atau telah menafikan keadilan asasi kepada GKL dan/atau telah membuat suatu anugerah yang bercanggah dengan dasar awam Malaysia. Mahkamah Tinggi juga adalah betul ketika mendapati bahawa aduan-aduan yang dikemukakan oleh GKL pada hakikatnya merupakan suatu rayuan terhadap anugerah tersebut. Dalam rayuan-rayuan ini, GKL dengan jelas berusaha untuk membuka semula, mengulangi dan berhujah semula isu-isu dalam timbang tara yang mana ianya tidak dibenarkan dalam keadaan kes ini (lihat perenggan 233–234).]

Cases referred to

AKN and another v ALC and others and other appeals [2015] SCD 107; [2015] 3 SLR 488, CA (refd)

Albion Energy Ltd v Energy Investments Global BRL [2020] EWHC 301 (Comm), QBD (refd)

AMDAC (M) Sdn Bhd v BYD Auto Industry Co Ltd [2020] 11 MLJ 281, HC (refd)

BZW & Anor v BZV [2022] SCD 9; [2022] SGCA 1; [2022] 1 SLR 1080, CA (refd)

CEF & Anor v CEH [2022] SCD 298; [2022] 2 SLR 918; [2022] SGCA 54, CA (refd)

Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan [2011] 1 AC 763, SC (refd)

Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals [2018] 1 MLJ 1; [2018] 1 CLJ 693, FC (refd)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)

Garden Bay Sdn Bhd v Sime Darby Property Bhd [2021] 2 MLJ 281, CA (refd)

H v G [2022] HKCU 2213; [2022] HKCFI 1327 (refd)

Hindustan Oil Exploration Co Ltd v Hardy Exploration & Production (India) Inc [2023] 4 MLJ 113, CA (refd)

Indian Farmers Fertiliser Cooperative Ltd v Gutnick [2015] VSC 724, SC (refd)

Jan De Nul (M) Sdn Bhd & Anor v Vincent Tan Chee Yioun & Anor [2019] 2 MLJ 413, FC (refd)

Johawaki Development Sdn Bhd v Majlis Agama Islam Wilayah Persekutuan and another summons [2020] MLJU 660, HC (refd)

London & North Eastern Rly Co v BA Collieries Ltd [1945] AC 143, HL (refd)
Magna Prima Construction Sdn Bhd v Bina BMK Sdn Bhd and another case [2015] 11 MLJ 841, HC (folld)
Master Mulia Sdn Bhd v Sigur Rus Sdn Bhd [2020] 12 MLJ 198; [2020] 9 CLJ 213, FC (refd)
Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors [2020] 12 MLJ 67; [2020] 10 CLJ 1; [2020] 1 LNS 1060, FC (refd)
Nor Hazliza bt Ismail & Anor v Mohamed Yusoff bin Shaik Madar [2024] 4 MLJ 770, CA (refd)
Pancaran Prima Sdn Bhd v Iswarabena Sdn Bhd and another appeal [2021] 1 MLJ 1; [2020] 9 CLJ 466, FC (refd)
PT Prima International Development v Kempinski Hotels SA and other appeals [2012] SCD 179; [2012] 4 SLR 98, CA (folld)
PT Thiess Contractord Indonesia v PT Kaltim Prima Coal & Standard Chartered Bank, Singapore Branch [2011] EWHC 1842 (Comm), QBD (refd)
Seadrill Ghana Operations Ltd v Tullow Ghana Ltd [2019] 1 All ER (Comm) 34, QBD (refd)
SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor [2016] 1 MLJ 464, FC (refd)
Tenaga Nasional Bhd v Kamarstone Sdn Bhd [2014] 2 MLJ 749, FC (refd)
Thai-Lao Lignite Co Ltd & Anor v Government of The Lao People's Democratic Republic [2017] MLJU 1196; [2017] 6 AMR 219, FC (folld)
The Government of India v Cairn Energy India Pty Ltd & Anor [2011] 6 MLJ 441, FC (refd)
TNB Fuel Services Sdn Bhd v China National Coal Group Corp [2013] 4 MLJ 857, CA (refd)
Tokio Marine Insurans (M) Berhad v Hi-Poly Industries Sdn Bhd [2020] MLJU 1446; [2020] 1 LNS 1477, HC (refd)
Transocean Offshore International Ventures Ltd v Burgundy Global Exploration Court [2010] SCD 31; [2010] 2 SLR 821; [2010] SGHC 31, HC (refd)
Tune Group Sdn Bhd & Ors v Padda Gurtaj Singh and another appeal [2023] 6 MLJ 345, CA (refd)
UEM Group Bhd (previously known as United Engineers (M) Bhd v Genisys Integrated Engineers Pte Ltd & Anor [2018] supp MLJ 363; [2010] 9 CLJ 785, FC (refd)

Legislation referred to

Arbitration (Amendment) (No 2) Act 2018
Arbitration (Amendment) Act 2011
Arbitration Act 2001 [SG] s 48(1)(a)(iv)
Arbitration Act 2005 ss 2(1), 8, 9, 9(2), (4)(a), (4A), (6), 25(1), (1)(a), (1)(b), (1)(c), 30, 30(4A), (5), 36, 37, 37(1), (1)(a), (1)(a)(iv), (1)(a)(v), (1)(b)(ii), (2)(b)(ii), (3), 38, 38(1), 39, 39(1)(a)(iv), (3), 41, 42, 43, 46, 48(1)(a)(iv), Chapters 6, 7, 8

A Construction Industry Payment and Adjudication Act 2012
Courts of Judicature Act 1964
Interpretation Acts 1948 and 1967 ss 2(1)(a), 16, Part 1
Limitation Act 1953
Limitation Act 1963 [IN]

B

Appeal from: *Sabah Shell Petroleum Company Limited v Gumusut-Kakap Semi-Floating Production System (Labuan) Limited and another case* [2022] MLJU 3504 (High Court, Kuala Lumpur)

C *Cyrus Das (with Lim Chee Wee, Lee Shih, Kwan Will Sen, Muayyad bin Khairulmaini and Emily Ho Mei Li) (Lim Chee Wee Partnership) for the appellant.*
Christopher Leong Sau Foo (with Janet Chai Pei Ying, Chloe Chew Khe Ying and Umesh Nerwin Nair a/l Sivakumar) (Chooi & Co) for the respondent.

D

Wong Kian Kheong JCA (delivering majority judgment of the court):

A. ARBITRAL PROCEEDINGS

E **[1]** In this judgment, I shall adopt the abbreviations for the parties as stated in the final award ('award') of a three-member arbitral tribunal ('Tribunal').

[2] Gumusut-Kakap Semi-Floating Production System (Labuan) Ltd ('GKL') and Sabah Shell Petroleum Co Ltd ('SSPC') entered into a contract
F No C-591673 on 9 November 2012 ('contract') with regard to the 'Gumusut Kakap Semi-Submersible Floating Production System' ('Semi-FPS').

[3] GKL instituted arbitral proceedings against SSPC before the Tribunal ('arbitration'). In the arbitration:

G

(1) GKL claimed from SSPC for variation works which had been performed by GKL but had not been paid by SSPC ('GKL's claim'). The following five issues arose with regard to GKL's claim ('five issues (GKL's claim)'):

H

(a) when was the 'Handover Completion' of the Semi-FPS?

(b) whether SSPC had failed to achieve the 'Commencement of Commercial Production' in a timely fashion;

(c) whether variation works were performed by GKL and whether SSPC was due to make payment to GKL for the variation works;

I

(d) whether SSPC was liable to repay USD20,000 for a call which was wrongly made on a bond under the contract; and

(e) whether the 'Warranty Defect Action Form' used in the correction of defects was correctly administered.

(2) SSPC counterclaimed from GKL with regard to the cost of rectification works incurred by SSPC ('SSPC's counterclaim'). In addition to the five issues (GKL's claim), the following three issues arose in respect of SSPC's counterclaim:

(a) whether GKL had properly completed its scope of works under the contract and whether SSPC was entitled to payment for works done by SSPC to complete the works or to remedy the defects in GKL's works;

(b) whether the Handover Completion was completed in accordance with the contract and if not, whether SSPC was entitled to payment of liquidated damages from GKL; and

(c) whether the functionality of the Semi-FPS was as required by the contract and if not, whether SSPC was entitled to damages from GKL.

[4] On 8 April 2020, the Tribunal issued the award as follows:

(1) the Handover Completion under the contract did not occur prior to 11 October 2014;

(2) SSPC shall pay GKL the additional lease rate of USD43,336.01 per day from the date of the award;

(3) GKL shall pay SSPC the following sums:

(a) USD324,695,970.59 for the work done claims, liquidated damages and overpayment in respect of the Semi-FPS day rate and sums awarded in the adjudication proceedings;

(b) USD84,844,226.64 for interest up to the date of the award;

(c) USD12,746,570.70 for costs under article 12(9) of the KLRCA Rules; and

(d) interest at 6.65%pa on the sums awarded in the award from the date of the award until payment (the award did not state 'pa').

(4) SSPC is entitled to set off the above claims against moneys owed by SSPC to GKL under the contract, including but not limited to the Semi-FPS day rate;

(5) GKL and SSPC shall do everything necessary to account for any GST (Goods and Services Tax) that has already been paid or may be due on the sums awarded, as may be required by relevant GST legislation and practice; and

(6) except as set out above, the Tribunal dismisses GKL's claim and SSPC's counterclaim.

B. PROCEEDINGS IN THE HIGH COURT

[5] GKL had filed against SSPC an Originating Summons ('OS') No WA-24C(ARB)-18–03 of 2021 in the High Court to set aside the award ('GKL's setting aside OS') under s 37 of the Arbitration Act 2005 ('the AA').

[6] OS No WA-24C(ARB)-10–05 of 2020 had been filed in the High Court by SSPC against GKL to enforce the award pursuant to s 38 of the AA ('SSPC's enforcement OS').

[7] In SSPC's enforcement OS, the learned High Court judge (as he then was) granted an ex parte order to enforce the award ('ex parte enforcement order'). GKL applied to the High Court to set aside the ex parte enforcement order ('GKL's setting aside application (ex parte enforcement order)').

[8] The High Court heard together GKL's setting aside OS and GKL's setting aside application (ex parte enforcement order).

[9] On 29 December 2022:

(1) the High Court dismissed GKL's setting aside OS with costs of RM175,000 (subject to allocatur fee) ('High Court's decision (GKL's setting aside OS)'); and

(2) GKL's setting aside application (ex parte enforcement order) was refused by the High Court with costs of RM175,000 (subject to allocatur fee) ('High Court's decision (ex parte enforcement order)').

C. PROCEEDINGS IN THE COURT OF APPEAL

[10] GKL had lodged the following two appeals in the Court of Appeal:

(1) Appeal No WA-02(IM)-124–01 of 2023 was filed against the High Court's decision (ex parte enforcement order) ('GKL's appeal (High Court's enforcement of award)'); and

(2) GKL lodged Appeal No WA-02(C)(A)-125–01 of 2023 against the High Court's decision (GKL's setting aside OS) ('GKL's appeal (High Court's dismissal of GKL's setting aside OS)').

I shall refer to GKL's appeal (High Court's enforcement of award) and GKL's appeal (High Court's dismissal of GKL's setting aside OS) collectively in this judgment as 'GKL's two appeals'.

[11] We heard GKL's two appeals together over the course of two days as

both these appeals concerned the award. Thereafter we reserved our decision with regard to GKL's two appeals.

[12] I have had the privilege to peruse a draft judgment for GKL's two appeals which had been prepared by my learned brother, Ong Chee Kwan JCA ('Ong Chee Kwan JCA's draft').

[13] I agree with all the contents of Ong Chee Kwan JCA's draft except for one matter ('sole disagreement'). It is entirely my misfortune to have the sole disagreement. With respect, I am of the view that the court should exercise its discretion to sever the award in accordance with:

(1) s 37(1)(a)(iv) and/or (v) of the AA read with s 37(3) of the AA; and

(2) s 39(1)(a)(iv) and/or (v) of the AA read with s 39(3) of the AA,

— when the Tribunal awarded a sum of USD324,695,970.59 in favour of SSPC against GKL which exceeded a limitation of GKL's liability of USD200m to SSPC (which was expressly provided in article 34.2 and 34.3 in Section II of the contract ('article 34.2' and 'article 34.3')).

[14] This judgment sets out the reasons for the sole disagreement. A draft of this judgment ('this draft') had been forwarded to my learned brothers, Che Mohd Ruzima bin Ghazali JCA (as he then was) and Ong Chee Kwan JCA. Che Mohd Ruzima bin Ghazali JCA (as he then was) had expressed his agreement with this draft. Hence, this judgment shall form the majority judgment for GKL's two appeals.

D. THE COURT'S DISCRETIONARY POWER UNDER SS 37(1)(a)(iv), (v), (3), 39(1)(a)(iv), (v) AND (3) OF THE AA

[15] Reproduced below are the relevant parts of ss 8, 9, 30, 37, 38 and 39 of the AA:

> s 8 *Extent of Court Intervention*
>
> *No court shall intervene in matters governed by [AA], except where so provided in [AA].*
>
> s 9 *Definition* and form of *arbitration agreement*
>
> (1) *In this Act, 'arbitration agreement' means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.*
>
> (2) *An arbitration agreement may be in the form of an arbitration clause in an agreement or in the form of a separate agreement.*
>
> (3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing —

(a) *if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means*; or

(b) *if it is contained in an exchange of statement of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.*

(4A) *The requirement that an arbitration agreement be in writing is met by any electronic communication that the parties make by means of data message if the information contained therein is accessible so as to be useable for subsequent reference.*

(5) A reference in an agreement to a document containing an arbitration clause shall constitute an arbitration agreement, provided that the agreement is in writing and the reference is such as to make that clause part of the agreement.

(6) *For the purpose of this section, 'data message' means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange, electronic mail, telegram, telex or telecopy.*

Chapter 6

Making of Award and Termination of Proceedings

s 30 Law Applicable to Substance of Dispute

...

(4A) *The arbitral tribunal shall decide according to equity and conscience only if the parties have expressly authorized it to do so.*

(5) *The arbitral tribunal shall, in all cases, decide in accordance with the terms of the agreement* and shall take into account the usages of the trade applicable to the transaction.

Chapter 7

Recourse against award

s 37 *Application for setting aside*

(1) *An award may be set aside by the High Court only if —*

(a) *the party making the application provides proof that —*

...

(iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;

(v) subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration;

...

(3) *Where the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside.*

...

Chapter 8

Recognition and enforcement of awards

s 38 *Recognition and enforcement*

(1) *On an application in writing to the High Court, an award made in respect of an arbitration where the seat of arbitration is in Malaysia or an award from a foreign State shall, subject to this section and section 39 be recognized as binding and be enforced by entry as a judgment in terms of the award* or by action.

...

s 39 *Grounds for refusing recognition or enforcement*

(1) *Recognition or enforcement of an award, irrespective of the State in which it was made, may be refused only at the request of the party against whom it is invoked*

(a) *where that party provides to the High Court proof that —*

...

(3) *Where the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced.*

...

(iv) *the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration*;

(v) *subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration*;

... (Emphasis added.)

[16] Firstly, the scope of s 37(1)(a)(iv) and (v) of the AA had been explained by Jeffrey Tan FCJ in the Federal Court case of *Thai-Lao Lignite Co Ltd & Anor v Government of The Lao People's Democratic Republic* [2017] MLJU 1196; [2017] 6 AMR 219, at [197], as follows:

[197] *In relation to 'the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration' and 'the award contains decisions on matters beyond the scope of the submission to arbitration', William & Kawharu at 17.5.4 thus commented on the first limb of art 34(2)(a)(iii) of the NZ Arbitration Act (the equivalent of s 37(1)(a)(iv) and (v) of AA 2005)*:

This ground for setting aside is directed at situations in which a tribunal has jurisdiction under a valid arbitration agreement, but has exceeded the authority by dealing in the award with matters that go beyond the terms of the arbitration agreement or the scope of the issues referred by the parties for resolution ... The tribunal also has an obligation to take particular care to keep within the confines of these matters that the parties have plainly put in issue ... If the tribunal exceeds its

authority in respect of some matters only, and its decisions on those matters are severable from decisions on matters made within the submission to arbitration, the High Court may only set those parts of the award containing the decisions on matters not submitted to arbitration. (Emphasis added.)

[17] In the Court of Appeal case of *Garden Bay Sdn Bhd v Sime Darby Property Bhd* [2021] 2 MLJ 281, at paras [60], [61], [65] and [66], Azizah Nawawi JCA (as she then was) decided as follows:

Dispute not contemplated by or not falling within the terms of the submission to arbitration

[60] *The other issue raised by the learned judge was whether the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration when the arbitrator decided that by conduct, the parties have accepted that Sime Darby's claim for rectification works is the sum retained as retention sum under the contract.*

[61] *On the legal position, we agree that it is trite law that when parties refer their dispute to arbitration, the mandate of the arbitrator must be limited to the terms defined by the parties for him to exercise his jurisdiction. If the arbitrator strays from the confines of this mandate, he will be acting in excess of his jurisdiction, even though he may have the initial and primary jurisdiction to arbitrate between the parties.*

...

[65] *In the first place, it is not correct for Sime Darby to submit that the issue submitted for arbitration was Garden Bay's claim for RM338,666.39 only, being the balance sum which remain unpaid by Sime Darby in Project. The issue on the rectification cost was also part of Sime Darby's counterclaim in the arbitration, and this was accepted by the learned trial judge in paragraph [48] of the judgment, that it was 'within the parties' submission to arbitration that the Arbitrator should decide on whether the Respondent was entitled to the sum of RM246, 978.00 being the costs of rectification works or such other amount as may be assessed by the Arbitrator or not at all ...*

[66] *Therefore, the issue posed by Sime Darby and accepted by the learned judge, that whether there was consent between the parties by conduct that Sime Darby had accepted the retention sum as payment for the rectification, was an issue within the contemplation of the parties on the rectification costs.* As accepted by the learned judge, the arbitrator should decide on whether Sime Darby was entitled to the sum of RM246,978 being the costs of rectification works or such other amount as may be assessed by the Arbitrator or not at all. (Emphasis added.)

[18] According to the judgment of Mary Lim J (as she then was) in the High Court case of *Magna Prima Construction Sdn Bhd v Bina BMK Sdn Bhd and another case* [2015] 11 MLJ 841, at para [32]:

[32] *The tests under sub-para 37(1)(a)(v) require the plaintiff to satisfy the court that the learned arbitrator had exceeded his jurisdiction and had dealt with a matter beyond his jurisdiction. For this, at the very least, the points of claim, defence and reply must be*

considered as these documents define the limits of the learned arbitrator's jurisdiction. (Emphasis added.)

[19] In resisting GKL's two appeals, SSPC's learned counsel had relied on, among others, the judgment of Azimah Omar JCA (as she then was) in the Court of Appeal in *Hindustan Oil Exploration Co Ltd v Hardy Exploration & Production (India) Inc* [2023] 4 MLJ 113. I cite the following passages in *Hindustan Oil Exploration*, at paras [20], [40], [42] and [66]–[75]:

[20] *In its attempt to set aside the majority award, the plaintiff had advanced the following contentions before the learned judicial commissioner (now High Court judge)*:

(a) *the majority of the tribunal decided Malaysian limitation laws and not Indian limitations laws applied to the dispute and found that no part of the defendant's claims was time barred ('applicable limitation laws decision')*;

...

[40] *In order to determine whether the learned judicial commissioner was plainly wrong in arriving at her decisions, we shall delve into our deliberations by gradually determining the following three issues in the following sequence*:

Issue No (i)

Whether the decision of the majority of the tribunal (in applying the Malaysian limitation law (as the seat of arbitration is Kuala Lumpur — article 17.12 of the JOA) instead of the Indian limitation laws (as prescribed by article 18 of the JOA — chosen law of the parties) was a decision that exceeded the tribunal's mandate scope of submission and jurisdiction, and thereby can be set aside under s 37(1)(a)(v) [AA].

...

[42] *The plaintiff had disputed the defendant's claims on the ground that a large part of the defendant's claims was for expenses incurred more than three years before the commencement of the arbitration (on 17 March 2017) which according to the plaintiff ought to be time barred under the Indian limitation laws (s 3 of the Indian Limitation Act 1963).*

...

[66] Faced with this dilemma, it is pertinent that this court cast much needed light to unravel this Gordian knot. Firstly, specific to arbitral awards involving time limitation issues, it is pertinent that the tests and deliberation be tied back down to the pure determination between what is procedural law and what is substantive law. This is in light of the unique or niche circumstance that time limitation can both be considered to be part of the decision-making process (as procedural law) which can be caught under s 37, and also issue of law and fact under s 42. Thus, the mere identification between a matter of decision-making process or a matter of law or fact is not entirely helpful in specific cases such as the present appeal that involves the law on time limitation.

[67] Thus, if the learned JC has found that time limitation is a procedural issue, then the learned JC must also remain consistent as to find that time limitation (as a procedure) is also an integral part of the decision-making process (which can fall within the ambit of s 37). Thus, this Court of Appeal must depart (albeit very slightly) from the learned JC's ratio decidendi that the arbitral tribunal's decision on time limitation (if indeed erroneous) cannot fall within s 37 [AA]. If indeed the arbitral tribunal had erred in their interpretation of the procedural law on time limitation, then the arbitral award is 'procedurally impaired'. Thus, such procedural impairment would fall within the meaning of 'decision making process' under s 37. Therefore, the High Court is indeed clothed with sufficient jurisdiction to examine the correctness of the arbitral tribunal's decision-making process (in its determination of the time limitation issue).

[68] The High Court in addressing the issue of time limitation must ask the more helpful question, that is 'whether the disputation is purely procedural or the disputation would also involve the question and examination of merits'. To this court's mind, if a particular issue or disputation would remain unchanged notwithstanding the merits of a case, then that particular issue or disputation is purely procedural. Alike in an arbitral award involving time limitation, time limitation is a purely procedural issue that is entirely disjointed and unaffected by the merits of any parties' cases. Time limitation is entirely blind to whether or not a party can prove any measure of liability against another. Even if there was any form of civil wrong proven on merits, time limitation shall still prevail if the complaint of such civil wrong was not procedurally voiced out within the prescribed limitation period. Therefore, since time limitation is blind to the substance or merits of the case, it cannot at all be said that time limitation is a matter of substantive law. In this sense, this court is in full agreement with the learned JC's finding that time limitation is a matter of procedural law (and not of substantive law).

[69] A more meaningful expansion of the term 'admissibility' as propounded in the case of *BBA v BAZ*, would be 'procedural admissibility'. Thus, instead of embarking on a lengthy discourse on whether time limitation is a matter of admissibility or jurisdiction, it would be infinitely more helpful to determine whether time limitation is an issue of procedural admissibility or an issue of merit (or substance). Thus, this court is inclined to adopt the expanded meaning of 'procedural admissibility', as opposed to the Singaporean court's classification exercise between a matter of admissibility or jurisdiction. Thus, this court does not entirely follow the test in *BBA v BAZ* to classify time limitation to either be a matter of admissibility or jurisdiction.

[70] *The more meaningful classification would be (as this court has previously stressed) is to classify whether or not the matter was purely a procedural issue (which remains unchanged and undisturbed notwithstanding the merits of the case) or a substantive issue (which is indubitably affected by the facts, evidence, and merits of the case). And clearly, time limitation is one procedural issue that is indeed blind to the merits of the case.*

[71] This manner of test and classification would effectively reconcile the appropriate approach to a time limitation issue in all aspects (in the face of the differences between s 37 and the repealed s 42, and the Malaysian Federal Court's (in *Jan De Nul (M) Sdn Bhd & Anor v Vincent Tan Chee Yioun & Anor* [2019] 2 MLJ

413; [2019] 1 CLJ 1) classification of matters concerning the decision-making process (under s 37) and issue of law and fact which affects the parties' positions (under the repealed s 42).

[72] *Nonetheless, even if the High Court is clothed with the necessary jurisdiction to examine the arbitral tribunal's decision-making process (in applying time limitation), the High Court ought not to interfere with the arbitral tribunal's interpretation and application of the relevant time limitation if the arbitral tribunal's interpretation and application of time limitation is legally sound.*

[73] *Notwithstanding the slight dissonance within the analysis and reasoning of the learned judicial commissioner, this court is still in agreement with the learned judicial commissioner's final conclusion that the issue of time limitation is purely and strictly a matter of curial or procedural law. Thus, the applicable law of time limitation shall be the governing procedural law of the seat of arbitration (that being the Malaysian law).*

[74] *We are also in agreement with the learned judicial commissioner's finding that estoppel applies to estop the plaintiff from now denying that the proper curial law of limitation is Malaysian law considering that the plaintiff itself has relied upon the Malaysian Limitation Act 1953 in the plaintiff's own attempt to prove that its counterclaims were not barred by limitation.*

[75] *Thus, there is no appealable errors within the final conclusion of the learned judicial commissioner's decision. Therefore, we answer issue No (i) in the negative.* (Emphasis added.)

I am of the following opinion regarding *Hindustan Oil Exploration*:

(1) one of the grounds to set aside a majority decision of the arbitral tribunal's final award ('majority decision (Tribunal)') under s 37(1)(a)(v) of the AA was that the majority decision (Tribunal) should have applied a provision in India's Limitation Act 1963 ('Indian Limitation Law') and not the Limitation Act 1953 of Malaysia ('the LA');

(2) the Court of Appeal upheld the High Court's dismissal of the application to set aside the majority decision (Tribunal) on the following five grounds:

   (a) the 'time limitation' issue was a procedural issue which was 'indeed blind to the merits of the case' — at para [70];

   (b) even if the High Court is clothed with the necessary jurisdiction to examine the decision-making process of the majority decision (Tribunal) (in applying the time limitation issue), the High Court ought not to interfere with the interpretation and application of the relevant time limitation of the majority decision (Tribunal) if such interpretation and application of time limitation was 'legally sound' — at para [72];

   (c) as the seat of arbitration was in Malaysia, the majority decision

(Tribunal) correctly applied the LA and not Indian Limitation Law — at para [73];

(d) the party (appellant) applying to set aside the majority decision (Tribunal) was estopped from relying on the Indian Limitation Law because the appellant also relied on the LA to submit that the appellant's counterclaim in the arbitral proceedings was not time-barred — at para [74]; and

(e) there were 'no appealable errors' with the High Court's dismissal of the appellant's application to set aside the majority decision (Tribunal) — at para [75];

(3) unlike GKL's two appeals, *Hindustan Oil Exploration* did not concern the application of a limitation of liability clause. Nor was there any discussion of s 37(1)(a)(iv) and (v) of the AA in *Hindustan Oil Exploration*.

[20] Section 48(1)(a)(iv) of the Arbitration Act 2001 of Singapore ('the AA (Singapore)') is similar to our s 37(1)(a)(iv), (v) and (3) of the AA. I reproduce below s 48(1)(a)(iv) of the AA (Singapore):

> s 48 *Court may set aside award*
>
> (1) *An award may be set aside by the Court —*
>
> (a) *if the party who applies to the Court to set aside the award proves to the satisfaction of the Court that —*
>
> ...
>
> (iv) *the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, except that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside;* (Emphasis added.)

As s 48(1)(a)(iv) of the AA (Singapore) is similar to our s 37(1)(a)(iv), (v) and (3) of the AA, cases from Singapore on that provision are persuasive and may be referred to. In this regard, I rely on the following judgment of the Court of Appeal of Singapore (its highest court) delivered by Chan Sek Keong CJ in *PT Prima International Development v Kempinski Hotels SA and other appeals* [2012] SCD 179; [2012] 4 SLR 98, at paras [31]–[34] and [47]:

> [31] *In our view, the crucial point in relation to the pleadings argument is whether the legal effect of the New Management contract was part of, or directly related to, the dispute which the parties submitted for arbitration. In PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597, *this court made the following observations on the jurisdiction (in the sense of the mandate or authority) of an arbitral tribunal:*

A

[37] *The law on the jurisdiction of an arbitral tribunal is well established. Article 34(2)(a)(iii) of the Model Law merely reflects the basic principle that an arbitral tribunal has no jurisdiction to decide any issue not referred to it for determination by the parties. In relation to this matter, we note Lord Halsbury's observations in London and North Western and Great Western Joint Railway Companies v J H Billington, Limited* [1899] AC 79*, where he noted, at 81, as follows:*

B

I do not think any lawyer could reasonably contend that, when parties are referring differences to arbitration, under whatever authority that reference is made, you could for the first time introduce a new difference after the order of arbitration was made. Therefore, upon that question I certainly do give a very strong opinion …

C

[Court of Appeal's emphasis in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA*]

In London and North Western and Great Western Joint Railway Companies v J H Billington, Limited [1899] AC 79 *at 81, Lord Halsbury LC was making a general observation that where an arbitral award had been made on issues that had been submitted for arbitration, one party could not be allowed to introduce a new dispute which was not within the scope of the submission to arbitration.*

D

[32] *An arbitration agreement is merely an agreement between parties to submit their disputes for arbitration. The disputes submitted for arbitration determine the scope of the arbitration. It is plain that the scope of an arbitration agreement in the broad sense is not the same as the scope of the submission to arbitration. The former must encompass the latter, but the converse does not necessarily apply, in that the particular matters submitted for arbitration may not be all the matters covered by the arbitration agreement. The parties to an arbitration agreement are not obliged to submit whatever disputes they may have for arbitration. Those disputes which they choose to submit for arbitration will demarcate the jurisdiction of the arbitral tribunal in the arbitral proceedings between them. An arbitral tribunal has no jurisdiction to resolve disputes which have not been referred to it in the submission to arbitration. Simply put, a party cannot raise a new dispute in an arbitration without the consent of the other party. These propositions flow inexorably from the consensual nature of arbitration.*

E

F

G

[33] *The role of pleadings in arbitral proceedings is to provide a convenient way for the parties to define the jurisdiction of the arbitrator by setting out the precise nature and scope of the disputes in respect of which they seek the arbitrator's adjudication.* It is for this purpose that Art 23 of the Model Law provides for the compulsory filing of pleadings as follows:

H

…

[34] Additionally, r 18 of the SIAC Rules (1997 Ed) also provides for pleadings to be filed by the parties. *Accordingly, in order to determine whether an arbitral tribunal has the jurisdiction to adjudicate on and make an award in respect of a particular dispute, it is necessary to refer to the pleaded case of each party to the arbitration and the issues of law or fact that are raised in the pleadings to see whether they encompass that dispute.*

I

…

A [47] *Having regard to the pleaded issues that were submitted for arbitration, which included Kempinski's claim for damages from 6 February 2002 onwards for 'the remainder of the term of the [Management] Contract' and its alternative claim for specific performance, the issue of what legal effect the New Management Contract had on the continuing viability of these two claims after 28 April 2006 was, in our view, within*
B *the scope of the parties' submission to arbitration …* (Emphasis added.)

[21] I am of the following view regarding the court's discretionary power under ss 37(1)(a)(iv), (v), (3), 39(1)(a)(iv), (v) and (3) of the AA:

C (1) in an application to set aside an arbitral award ('setting aside application'), s 37(1)(a)(iv), (v) and (3) of the AA concern the court's discretionary power to sever an arbitral award. Such discretion is clear from the permissive term 'may' used in s 37(1) and (3) of the AA.

D In an application for the court to recognise and enforce an arbitral award ('enforcement application'), the court's power under s 38(1) of the AA is subject to s 39 of the AA. By virtue of s 39(1)(a)(iv), (v) and (3) of the AA, the court has a discretion to enforce only part of the award in an enforcement application;

E (2) premised on the above four cases of *Thai-Lao Lignite*, *Garden Bay*, *Magna Prima Construction* and *PT Prima International Development* (which I shall refer in this judgment as the 'quadrilogy'), in deciding:

F (a) the 'terms of the submission to arbitration' in ss 37(1)(a)(iv) and 39(1)(a)(iv) of the AA; and

(b) the 'scope of the submission to arbitration' in ss 37(1)(a)(v) and 39(1)(a)(v) AA:

— the court shall consider the documents referred to in s 25(1)(a)–(c) of
G the AA. According to s 25(1) of the AA:

> s 25 *Statements of claim and defence*
>
> (1) Within the period of time agreed by the parties or, failing such agreement, as determined by the arbitral tribunal, *the claimant shall state* —
H
> (a) *the facts supporting his claim*;
>
> (b) *the points at issue; and*
>
> (c) *the relief or remedy sought*,
I
> *and the respondent shall state his defence in respect of the particulars set out in this subsection*, unless the parties have otherwise agreed to the required elements of such statements. (Emphasis added.)

The requirements in s 25(1) of the AA are mandatory. This is due to the fact

that the Legislature has employed the mandatory term 'shall' twice — the first 'shall' for a statement of claim and the second 'shall' for a defence. Notwithstanding the fact that s 25(1) of the AA is silent on a counterclaim, the mandatory requirements in s 25(1)(a)–(c) of the AA, shall also apply to a counterclaim;

(3) the phrase 'terms of the submission to arbitration' in ss 37(1)(a)(iv), (v), 39(1)(a)(iv) and (v) of the AA is wider than an 'arbitration agreement' defined in s 2(1) read with s 9(1) of the AA (agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship) — please refer to *PT Prima International Development*, at para [32]. This view is also supported by the following reasons:

(a) according to s 9(2) of the AA, an arbitration agreement may be in the form of an 'arbitration clause in an agreement' ('arbitration clause'). It is difficult to envisage an arbitration clause which contains *all* the 'terms of the submission to arbitration'; and

(b) an arbitration agreement has extended meanings pursuant to:

(i) s 9(4)(a) of the AA, namely, the content of the arbitration agreement is recorded 'in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means' ('arbitration agreement (s 9(4)(a) of the AA)'); and

(ii) s 9(4A) of the AA, ie, a written arbitration agreement may be in the form of '*any electronic communication that the parties make by means of data message if the information contained therein is accessible so as to be useable for subsequent reference*' (arbitration agreement (s 9(4A) of the AA)). 'Data message' is given a wide meaning in s 9(6) of the AA.

The arbitration agreement (s 9(4)(a) of the AA) and arbitration agreement (s 9(4A) of the AA), by their very nature, may not constitute *all* the 'terms of the submission to arbitration' as understood in ss 37(1)(a)(iv), (v), 39(1)(a)(iv) and (v) of the AA.

(4) the provisions in s 30(4A) and (5) of the AA are not relevant in the exercise of the court's discretionary power pursuant to ss 37(1)(a)(iv), (v), (3), 39(1)(a)(iv), (v) and (3) of the AA. I rely on the following reasons:

(a) Parliament has not provided for ss 37(1)(a)(iv), (v), (3), 39(1)(a)(iv), (v) and (3) of the AA to be subject to s 30(4A) and (5) of the AA. In fact, ss 37(1)(a)(iv), (v), (3), 39(1)(a)(iv), (v) and (3) of the AA do not even refer to s 30(4A) and (5) of the AA. By reason of s 8 of the AA which provides for a 'minimalist' approach by courts in deciding setting aside applications and enforcement applications, the court cannot take into

account s 30(4A) and (5) of the AA in deciding setting aside applications and enforcement applications; and

(b) s 37(1)(a)(iv), (v) and (3) of the AA are placed in Chapter 7 of the AA (Recourse against award). Section 39(1)(a)(iv), (v) and (3) of the AA are contained in Chapter 8 of the AA (Recognition and enforcement of awards). Section 30 of the AA is however placed in Chapter 6 of the AA (Making of Award and Termination of Proceedings).

According to s 2(1)(a) of the Interpretation Acts 1948 and 1967 ('the IA'), Part 1 of the IA applies to the construction of AA (enacted after 18 May 1967).

Section 16 of the IA (in Part 1 of the IA) provides as follows:

> 16 *Notice to be taken of division into* parts, *chapters*, etc
>
> *Where an Act* or subsidiary legislation *is divided into* parts or *chapter*s or otherwise, *the fact and particulars of the division shall, without express mention thereof in the Act* or subsidiary legislation, *be taken notice of in all courts and for all purposes whatsoever.* (Emphasis added.)

In *Nor Hazliza bt Ismail & Anor v Mohamed Yusoff bin Shaik Madar* [2024] 4 MLJ 770, at [11(1)], the Court of Appeal had applied s 16 of the IA in the construction of the Courts of Judicature Act 1964.

By virtue of s 16 of the IA, the court should take judicial notice of the different Chapters 6, 7 and 8 of the AA. Accordingly, s 30 of the AA should not be considered in the exercise of the court's discretionary power under ss 37(1)(a)(iv), (v), (3), 39(1)(a)(iv), (v) and (3) of the AA.

E. SHOULD THE COURT EXERCISE ITS DISCRETIONARY POWER UNDER SS 37(1)(a)(iv), (v), (3), 39(1)(a)(iv), (v) AND (3) OF THE AA IN THIS CASE?

[22] Articles 34.2 and 34.3 are contained in Section II of the Contract (Conditions of Agreement). Article 34.2 and 34.3 state as follows:

> *ARTICLE 34* CONSEQUENTIAL LOSS AND *LIMITATION OF LIABILITY*
>
> ...
>
> 34.2 *Applicability Limitation*
>
> *Any* exclusion or *limitation specified in the CONTRACT shall apply to claims in contract, tort or otherwise at LAW in respect of matters covered by such* exclusion or *limitation.*
>
> 34.3 *Limitation of Liability*
>
> *Notwithstanding any other provision of this CONTRACT, the total liability of the CONTRACTOR [GKL] to the COMPANY [SSPC] arising howsoever out of or in connection with the CONTRACT in respect of all claims, loss and/or expenses of every kind and nature whatsoever whether by way of indemnity or by reason of any breach of*

the CONTRACT (including without limitation any payment of Liquidated Damages) and/or in tort (including without limitation, negligence or gross negligence) or breach of any duty (statutory or otherwise), shall not exceed UNITED STATES DOLLARS TWO HUNDRED MILLION (USD200,000,000.00) in aggregate. The provision of this Article shall not apply to any indemnities given by the CONTRACTOR [GKL] under Article 29 headed INSURANCE BY THE CONTRACTOR [GKL], Article 23 headed TAXES AND TAX EXEMPTION CERTIFICATES, Article 27 headed PATENTS AND OTHER PROPRIETARY RIGHTS, Article 28 headed LIABILITIES AND INDEMNITIES, Article 32 headed CONFIDENTIALITY and Article 30 headed PERMITS, LAWS AND REGULATIONS. (Emphasis added.)

[23] My interpretation of articles 34.2 and 34.3 is as follows:

(1) as the contract was a commercial one, articles 34.2 and 34.3 should be construed by the court in a manner which makes business common sense ('business common sense construction') please refer to the judgment of Zainun Ali FCJ in the Federal Court case of *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 464, at para [78];

(2) according to article 2.1 of the contract, the heading, index, title, subtitle, subheading or marginal note of the contract 'shall' not 'limit, alter or affect the meaning or operation' of the contract;

(3) article 2.7 of the contract provides that the words 'other' and 'including' in article 34.3 do 'connote limitations in any way' on the meaning of article 34.3;

(4) a business common sense construction of article 34.3 clearly imposed a maximum liability of USD200m on the part of GKL as a 'total liability' which was due from GKL to SSPC 'arising howsoever out of or in connection with' the contract 'in respect of all claims, loss and/or expenses of every kind and nature whatsoever whether by way of indemnity or by reason of any breach of the contract (including without limitation any payment of Liquidated Damages) and/or in tort (including without limitation, negligence or gross negligence) or breach of any duty (statutory or otherwise)' ('GKL's maximum liability (USD200m)');

(5) article 34.3 had expressly provided for certain exceptions to GKL's maximum liability (USD200m) (article 34.3 'shall not apply to any indemnities given by [GKL] under Article 29 ..., Article 23 ..., Article 27 ..., Article 28 ..., Article 32 ... and Article 30 ...) ('exceptions to GKL's maximum liability (USD200m)');

(6) save for the exceptions to GKL's maximum liability (USD200m), GKL's maximum liability (USD200m) in article 34.3 should prevail over all other provisions of the contract. This was clear from the phrase

'Notwithstanding any other provision of this contract' as the opening words in article 34.3; and

(7) the above business common sense construction of article 34.3 is supported by article 34.2 (Any ... limitation specified in the Contract shall apply to claims in contract, tort or otherwise at law in respect of matters covered by such ... limitation).

[24] Premised on the quadrilogy, in deciding:

(1) the 'terms of the submission to arbitration' in ss 37(1)(a)(iv) and 39(1)(a)(iv) AA; and

(2) the 'scope of the submission to arbitration' in ss 37(1)(a)(v) and 39(1)(a)(v) AA:

The court shall consider the following documents:

(a) GKL's statement of claim (GKL's SOC) — please refer to s 25(1)(a)–(c) of the AA;

(b) SSPC's defence and counterclaim (SSPC's DCC);

(c) GKL's reply and defence to counterclaim (GKL's RDCC); and

(d) SSPC's rejoinder to GKL's RDCC (SSPC's rejoinder).

[25] Firstly, GKL's SOC did not allude to GKL's maximum liability (USD200m) because GKL was the claimant in the arbitration.

[26] Secondly, as a counter claimant, it was understandable why SSPC's DCC was silent regarding GKL's maximum liability (USD200m).

[27] In paras 475 (Part E8), 516(iii) (Part E12), 527–531 and 1181 of GKL's RDCC, GKL had expressly relied on GKL's maximum liability (USD200m).

[28] GKL's maximum liability (USD200m) had been denied in SSPC's rejoinder (which repeated at length the total sum of SSPC's counterclaim against GKL in excess of GKL's maximum liability (USD200m)).

[29] Based on GKL's RDCC and SSPC's rejoinder:

(1) the 'terms of the submission' to the arbitration within the meaning in ss 37(1)(a)(iv) and 39(1)(a)(iv) of the AA ('terms of submission (arbitration)'); and

(2) the 'scope of the submission' to the arbitration as understood in ss 37(1)(a)(v) and 39(1)(a)(v) of the AA ('scope of submission (arbitration)'),

– included, among others, the requirement that SSPC's counterclaim should be limited by GKL's maximum liability (USD200m).

[30] Inexplicably, in an extremely long award of 3461 paragraphs, the Tribunal only alluded to GKL's maximum liability (USD200m) in one paragraph as follows ('para 2714 (award)'):

> [2714] *It follows that the Tribunal does not consider that, apart from the claim for Liquidated Damages under Clause 37.1 of Section II of the Contract, any of the claims made by SSPC are caught by the limit of liability of USD200m under provisions of Clause 34.3.* (Emphasis added.)

[31] I am of the following view:

(1) para 2714 (award) had dealt with a dispute not contemplated by or not falling within the terms of submission (arbitration) regarding GKL's maximum liability (USD200m);

(2) para 2714 (award) contained a decision on a matter beyond the scope of submission (arbitration) in respect of GKL's maximum liability (USD200m);

(3) contrary to the quadrilogy, the High Court had committed an error in law in not perusing GKL's RDCC and SSPC's rejoinder so as to ascertain the terms of submission (arbitration) and scope of submission (arbitration) with regard to GKL's maximum liability (USD200m); and

(4) I have no hesitation to exercise my discretion to sever the award in accordance with ss 37(3) and 39(3) of the AA so as to confine the amount to be paid by GKL to SSPC, to an aggregate sum of USD200m ('GKL's total liability (SSPC)'). Such exercise of discretion is due to the fact that GKL's maximum liability (USD200m) had been expressly agreed to by both GKL and SSPC (represented by legal counsel) after extensive negotiations at arm's length with regard to the high risks involved in the extraction of crude oil from sea bed.

GKL is bound to pay interest on GKL's total liability (SSPC) at the rate stated in the award. Based on GKL's total liability (SSPC), the sum of USD84,844,266.64 (pre-award interest in the award) shall be varied accordingly.

F. COSTS

[32] As GKL is partially successful in GKL's two appeals, GKL is only entitled to a part of the costs for GKL's two appeals.

[33] On Friday, 5 December 2025, after the delivery of:

(1) my decision; and

(2) the decision of Ong Chee Kwan JCA,

we have unanimously agreed to the following order of costs here and below (subject to allocatur fee):

(a) SSPC shall pay to GKL costs in a sum of RM75,000 for GKL's appeal (High Court's dismissal of GKL's setting aside OS);

(b) costs of RM75,000 for GKL's appeal (High Court's enforcement of award), shall be borne by SSPC in favour of GKL; and

(c) the High Court's two orders for costs in GKL's setting aside OS and GKL's setting aside application (ex parte enforcement order) (High Court's two costs orders), are maintained.

G. CONCLUSION

[34] GKL's two appeals are allowed with the following order:

(1) the award is varied wherein:

(a) GKL is only liable to SSPC with regard to GKL's total liability (SSPC); and

(b) the amount of interest, pre-award and post-award, shall be premised on GKL's total liability (SSPC).

(2) the High Court's decision (GKL's setting aside OS) and High Court's decision (ex parte enforcement order) are varied as stated in the above sub-paras (1)(a) and (b);

(3) the High Court's two costs orders are maintained; and

(4) SSPC shall pay to GKL costs for GKL's two appeals as stated in the above sub-paras 33(a) and (b).

[35] In closing, I must express my gratitude to all learned counsel for their able assistance in GKL's two appeals, without which this judgment would not have been possible.

Ong Chee Kwan JCA (delivering dissenting judgment of the court):

INTRODUCTION

[36] This judgment raises for determination, among other issues, a question of some significance to the arbitral process, namely whether an arbitral tribunal's jurisdiction is circumscribed by the limitation of liability clause contained in the substantive agreement between the parties. The appellant contends that, by virtue of s 30(5) of the Arbitration Act 2005, which obliges

the arbitral tribunal to decide the disputes in accordance with the terms of the agreement', the arbitral tribunal lacked jurisdiction to render an award in excess of the contractual cap on liability. The respondent, on the other hand, maintains that such clauses do not delimit jurisdiction but merely define the scope of substantive rights and remedies, leaving the arbitral tribunal's jurisdiction to be governed by the arbitration agreement itself. It is against this backdrop that the court is invited to consider, inter alia, the proper characterisation of limitation clauses within the framework of arbitral jurisdiction under Malaysian law.

[37] There are two appeals before this court. Both the Appeal No W-02(IM)-124–01 of 2028 ('Appeal 124') and Appeal No W-02(C)(A)-125–01 of 2023 ('Appeal 125') concern the arbitral award dated 8 April 2020 ('award') issued in an arbitration between the appellant, Gumusut-Kakap Semi-Floating Production System (Labuan) Ltd ('GKL' or 'the appellant'), and the respondent, Sabah Shell Petroleum Co Ltd ('SSPC' or 'the respondent'), where the arbitral tribunal awarded a sum of USD422m (with interest of 6.65% from date of the award until full payment) in favour of SSPC.

[38] The award arose from a dispute concerning a semi-submersible floating production system for a deepwater oil field in Malaysia. Appeal 124 is the appellant's appeal against the High Court's decision dismissing its application to set aside the ex parte order obtained by the respondent to enforce the award pursuant to s 39 of the Arbitration Act 2005 ('the AA 2005'). Appeal 125 is also the appellant's appeal against the High Court's decision to dismiss its application to set aside the award pursuant to s 37 of the AA 2005. Both applications were dismissed on 29 December 2022 by the learned High Court judge (as he then was), Lim Chong Fong J.

[39] The appellant contended that the award was made in excess of jurisdiction, breach of natural justice, and breach of public policy. More specifically, that:

(a) the arbitral tribunal exceeded its jurisdiction by awarding monetary relief to the respondent in excess of the maximum amount permitted to be awarded (ie USD200m) under the limitation of liability clause in the contract between the parties;

(b) by determining the respondent's claim for the costs of hiring two accommodation vessels: (i) on the basis of a document that was not produced in evidence; (ii) in a manner that sanctioned a double recovery; and (iii) on an arbitrary basis, the arbitral tribunal acted in breach of natural justice, in breach of public policy and or exceeded its jurisdiction;

(c) by determining the respondent's claim for common costs in a manner

that (i) sanctioned a double recovery; (ii) departed from the method of assessment it had resolved to apply to link the respondent's claims to defects remediation works; (iii) ignored the basis on which the claim had been advanced by the respondent and responded to by the appellant; and (iv) was, without warning or reasonable opportunity for the parties to make submissions, based instead on an arbitrary 50% adjustment that formed no part of either party's pleaded case, the arbitral tribunal acted in breach of natural justice, in breach of public policy and or exceeded its jurisdiction; and

(d) by determining large parts of the respondent's claim for specific costs via a sampling and extrapolation approach, and without allowing those claims to be scrutinised or requiring them to be proven, the arbitral tribunal had acted in breach of public policy and or exceeded its jurisdiction.

[40] I finds no merits to both the appeals and accordingly dismissed the two appeals with costs.

BACKGROUND FACTS

The parties

[41] The appellant is a wholly-owned subsidiary of MISC Bhd ('MISC'). MISC is a public listed company on the Main Market of Bursa Malaysia, and is 51% owned by Petroliam Nasional Bhd ('PETRONAS'). The appellant is a special purpose vehicle whose principal activity is owning and leasing the Gumusut Kakap Semi-Submersible Floating Production System ('Semi-FPS').

[42] The respondent is part of the Shell group of companies. The respondent's principal activity is the extraction of crude petroleum and natural gas. The respondent is the operator of Malaysia's Deepwater Gumusut-Kakap oil field, where the Semi-FPS is stationed. The respondent leases the Semi-FPS from the appellant. The Semi-FPS can process up to 150,000 barrels of crude oil per day and was valued in 2018 at approximately USD1.549 billion.

The contractual relation

[43] PETRONAS offered the respondent the opportunity to be involved in the project to develop the Gumusut-Kakap oil field because PETRONAS recognised that the respondent's parent company, Shell, could bring additional deep-water expertise.

[44] The project was aimed at bringing in a transfer of technology, development of local capability and capacity, as well as foreign direct

investment. The overall purpose was to improve and promote Malaysia as a regional deep-water development hub. The respondent and the appellant executed a construction-cum-lease agreement. The appellant would design, procure, construct and then lease the Semi-FPS to the respondent. MISC was the agent and or contractor of the appellant in the performance of the engineering, procurement and construction ('EPC') of the Semi-FPS.

[45] In 2006, the respondent issued an instruction and letter of authorisation to proceed, authorising MISC to proceed with the EPC work scope pending the finalisation of the contract. Malaysia Marine and Heavy Engineering Sdn Bhd was engaged as MISC's main subcontractor in respect of the EPC work.

[46] On 4 October 2012, MISC sold the Semi-FPS to the appellant whilst the Semi-FPS was still under construction. MISC undertook to complete all the necessary work for handover completion.

[47] By November 2012, the parties were still negotiating the contract, even though the construction of the Semi-FPS was at an advanced stage.

[48] On 9 November 2012, the appellant and the respondent entered into the contract No C-5916731 ('contract'). Certain amendments were subsequently made to the contract by agreement. In particular, on 28 August 2013, by way of a letter, the appellant and the respondent agreed to certain terms whereby the respondent would have exclusive access to the Semi-FPS, among other terms.

[49] Separately, the respondent and PETRONAS entered a production sharing contract ('PSC'). The appellant is not privy to the PSC, which has never been disclosed.

The appellant's adjudication claim

[50] Certain disputes arose between the appellant and the respondent in relation to the contract, and on 22 September 2016, the appellant initiated adjudication proceedings against the respondent in respect of its claim for unpaid variation works ('first adjudication proceedings') pursuant to the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA'). The first adjudication proceedings were in respect of two tranches of unpaid variation works.

[51] On 25 April 2017, the appellant initiated a second round of CIPAA adjudication proceedings against the respondent in respect of a third tranche of unpaid variation works ('second adjudication proceedings').

[52] Both adjudication proceedings were decided in the appellant's favour and for completeness, the arbitral tribunal in its award upheld the findings in relation to the appellant's claims in the adjudication proceedings.

The arbitration

[53] On 2 September 2016, the appellant commenced arbitration proceedings against the respondent ('the arbitration'). The consisted of:

(a) Professor Doug Jones AO;

(b) Dr Robert Gaitskell QC; and

(c) Sir Vivian Ramsey,

(collectively referred as 'the arbitral tribunal')

[54] The arbitration proceedings in question was not of the ordinary or usual scale or size arbitration. To illustrate the magnitude of the matter in terms of evidence and facts involved in the arbitration and the level of details that the parties and the had analysed and gone into:

(a) the arbitral tribunal had to examine 1,647 pages of pleadings and submissions from the appellant, 1,359 pages of pleadings and submissions from the respondent, 843 pages of joint statements of experts (not including appendices), 1,124 pages of expert reports from the appellant (not including appendices and exhibits) and 1,050 pages of expert reports from the respondent (not including appendices and exhibits);

(b) the appellant and the respondent each had their own technical experts and delay experts in relation to the respondent's work done claim, and their own respective quantum experts;

(c) over the course of a three-week hearing, the heard nine factual and nine expert witnesses from the appellant and 12 factual and three expert witnesses from the respondent, and this was not inclusive of the significant number of factual and expert witnesses who presented testimonies and reports on the matter but were not cross-examined and therefore not heard at the three-week long hearing;

(d) in total, the appellant had 14 factual witnesses who provided a total of 24 witness statements and 13 experts spread across multiple disciplines who provided expert reports, and the respondent had 13 factual witnesses with a total of 18 witness statements and four experts spread across multiple disciplines, and all of the experts participated in joint statements;

(e) the arbitral tribunal had to consider over 450,000 documents (almost a terabyte of documentation), before the arbitral tribunal delivered the award;

(f) there was also a whole host and thread of communications between the arbitral tribunal and the experts and the solicitors of the parties, as set out in paras 64–209 of the award;

(g) after the evidentiary hearing took place, the also invited the parties to make further submissions, inter alia, on their respective positions under Malaysian law, covering subjects such as the burden and standard of proof, and double claiming of costs;

(h) the parties made such further submissions and the appellant was provided the opportunity to and did respond to the respondent's submissions on these points, all of which the thoroughly considered in making its determinations, as set out in paras 278–369 of the award; and

(i) the parties also entered into a quantum experts access agreement, which granted the the right to have direct access to the quantum experts for the purpose of performing calculations on the basis of existing material contained in their expert report forming part of the evidential record, adopting assumptions provided to them by the . The communications between the and the quantum experts were disclosed by the as an appendix to the award, and have also been listed by the arbitral tribunal in paras 157–206 of the award.

[55] The above underscores the extensive and thorough process undertaken by the parties and the to resolve the parties' dispute.

[56] The dealt with: (i) the appellant's claims against the respondent for unpaid variation works; and (ii) the respondent's counterclaim against the appellant for payment for defects remediation works and costs associated with defects remediation works.

[57] The appellant's claims sought determination of the following issues:

(a) unpaid variation works payments for construction work carried out by MISC;

(b) the date of Handover Completion of the Semi-FPS;

(c) the respondent's delayed achievement of commencement of commercial production ('CoCP');

(d) whether a call, by the respondent, on a bank guarantee under the contract was wrongly made; and

(e) whether the warranty defect action form ('WDAF') process had been

correctly administered in the correction of defects.

[58] The respondent in turn by way of counterclaim sought determination of, inter alia, the following issues:

(a) whether the appellant had properly completed its scope of work under the contract, and whether the respondent was entitled to payment for work done to complete the works or remedy defects;

(b) whether handover completion was completed in accordance with the contract, and whether the respondent was entitled to payment of liquidated damages; and

(c) whether the functionality of the Semi-FPS was as required by the contract, and if not, whether the respondent was entitled to damages.

Agreement to exclude challenge on question of law

[59] It is significant that in respect of the arbitration, the parties had agreed to exclude the application of ss 41, 42, 43 and 46 of the AA 2005 in the arbitration proceedings and therefore neither the appellant nor the respondent can challenge the award on the basis that the arbitral tribunal had fallen into error of law.

The award

[60] On 8 April 2020, the arbitral tribunal issued the award. More specifically, the awarded in para [3461] of the award as follows:

AWARD

3461. Accordingly, on the basis of the findings in this Award and for the reasons set out in this Award, the Tribunal determines, declares and awards, as follows:

(1) That Handover Completion under the Contract did not occur prior to 11 October 2014;

(2) That SSPC shall pay GKL the Additional Lease Rate of USD 43,336.01 per day as from the date of this Award;

(3) That GKL shall pay SSPC the following sums:

(a) USD 324,695,970.59 for the Work Done Claims, Liquidated Damages and Overpayment in respect of the Semi-FPS Day Rate and sums awarded in the Adjudication Proceedings;

(b) USD 84,844,226.64 for interest up to the date of this Award;

(c) USD 12,746,570.70 for Costs under Article 12(9) of the KLRCA Rules;

(d) Interest at 6.65% on the sums awarded in this Award from the date of this Award until payment.

(4) That SSPC is entitled to set-off the above claims against moneys owed by SSPC to GKL under the Contract, including but not limited to the Semi-FPS Day rate.

(5) That GKL and SSPC shall do everything necessary to account for any GST that has already been paid or may be due on the sums awarded, as may be required by relevant GST legislation and practice.

(6) Except as set out above, the Tribunal dismisses the Claims of GKL and the Counterclaims of SSPC

[61] Upon receipt of the award:

(a) the appellant commenced invoicing the respondent for the uplifted amount of USD43,336.01 as set out in para 3461(2) of the award; and

(b) the respondent commenced setting off the sums of USD643,336.01 against the amounts set out in para 3461(3) of the award.

[62] This court was informed by the parties that the respondent, being entitled to set off its claims against moneys owed by the respondent to the appellant under the contract (including but not limited to the Semi-FPS day rate) has effectively recovered fully its counterclaim awarded by the arbitral tribunal from the appellant.

The appellant's setting aside applications

[63] On 22 May 2020, the respondent filed an application in court under s 38 of the AA 2005 to enforce the award. This was filed under Kuala Lumpur High Court Originating Summons No WA-24C(ARB)-10–05 of 2020 ('OS 10').

[64] On 7 July 2020, the appellant filed an application in court pursuant to s 37 of the AA 2005 to set aside the award. On the same day, the respondent obtained an ex parte order to enforce the award ('SSPC's ex parte order').

[65] Subsequently, on 27 July 2020, the appellant filed its application to set aside the SSPC's ex parte order pursuant to s 39 of the AA 2005. Both setting aside applications shall be collectively referred to as 'appellant's setting aside applications'.

[66] The appellant's setting aside applications were premised on arguments, amongst others, that the award was in excess of the arbitral tribunal's jurisdiction, in breach of public policy, and or was issued in breach of natural justice.

[67] On 29 December 2021, the learned High Court judge dismissed the appellant's setting aside applications with costs.

ISSUES FOR DETERMINATION

[68] Based on the aforesaid, the parties have placed before this court the following issues of law for determination:

(a) whether the arbitral tribunal in making its award for damages in excess of the cap of USD200m set out in article 34.3 of the contract had acted in excess of its jurisdiction;

(b) whether the arbitral tribunal in determining the respondent's claim for the costs of hiring two accommodation vessels had acted in breach of natural justice and in breach of public policy when:

(i) it made a legal and factual finding based on a document ie the production sharing contract ('PSC') between PETRONAS and the respondent, to which the appellant was not privy, and which was never produced in evidence, and which the appellant never had the opportunity to review it;

(ii) its' award sanctioned a double recovery of the accommodation vessels costs and unjustly enriched the respondent; and/or

(iii) it undertook to assess the proportion of accommodation vessels costs attributable to the appellant, where this assessment was

arbitrary, and the parties had not been allowed to submit on the appropriate proportion;

(c) whether the in determining the respondent's claim for common costs had acted in breach of natural justice, in breach of public policy, and or in excess of jurisdiction in three respects:

(i) whether the arbitral tribunal had sanctioned a double recovery by awarding time-related common costs in respect of the delay up to February 2014, notwithstanding that it had held that the delay in that period was covered by liquidated damages under the contract and could not be the subject of delay damages;

(ii) whether the failed to assess the relationship of the respondent's common costs claims to defects remediation works according to the method of assessment that it had resolved to apply, and on which the appellant had based its submissions; and

(iii) whether the awarded an arbitrary 50% reduction for two heads of non-time related common costs without giving reasonable notice or opportunity to the parties to submit, and in manifest disregard of the applicable terms of the contract and principles of applicable law;

(d) whether in determining the respondent's claims for specific minor costs, the arbitral tribunal had acted in breach of public policy and or exceeded its jurisdiction by applying a methodology of 'sampling and extrapolation' to decide which categories of costs were proven and were to be awarded.

THE COURT'S CONSIDERATIONS

[69] Generally, the applicable test that has to be satisfied by the appellate court before intervening with the decision of the trial judge below is well established it is the 'plainly wrong test'. In other words, in the absence of some other identifiable error, such as a material error of law or the making of a critical factual finding which had no basis in the evidence, the appellate court should not interfere with the factual findings of the trial judge unless it was satisfied that the decision of the trial judge was 'plainly wrong' in the sense that it could not reasonably be explained or justified and so was one which no reasonable judge could have reached. If the appellate court was not satisfied that the decision came within that category, it was irrelevant that, with whatever degree of certainty, it considered that it would have reached a different conclusion from the trial judge (see: *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309 (FC); *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67; [2020] 10 CLJ 1; [2020] 1 LNS 1060 (FC); *UEM*

Group Bhd (previously known as United Engineers (M) Bhd v Genisys Integrated Engineers Pte Ltd & Anor [2018] supp MLJ 363; [2010] 9 CLJ 785 (FC)).

[70] However, in arbitration cases, the 'plainly wrong test' is not the correct threshold. Instead, the appellate court has to ask: did the learned High Court judge apply the correct principles under the AA 2005? The appellate court is not to re-evaluate the merits but only to check if the learned High Court judge fell into an error of law within the strict confines of the AA 2005.

[71] The aforesaid approach by the appellate courts is well established. The Federal Court in *Master Mulia Sdn Bhd v Sigur Rus Sdn Bhd* [2020] 12 MLJ 198; [2020] 9 CLJ 213 at paras [39] and [54] encapsulated this in the following manner:

> [39] T*he fourth key concept of the Model Law is that of limited and clearly defined instances of court intervention into the arbitration process, with a curtailed right of appeal from a court decision sought during the pendency of the arbitral proceedings. The role of the courts in general is one of assistance supportive of the arbitral process and not one of interference with it.* The approach of the Model Law, which allows prompt recourse to court during the arbitral proceedings, but simultaneously permits the arbitration to go forward, represents a balance between the potential for delay through dilatory tactics of a recalcitrant party, and the futility and high cost of arbitral proceedings in which the award is ultimately set aside by the court.
>
> ...
>
> [54] Underlying these guiding principles is the policies and objectives of the New York Convention and the Model Law. As a matter of principle and policy, the courts will seek to support rather than frustrate or subvert the arbitration process. *The role of courts in the arbitral regime in general is one of assistance supportive of the arbitral process and not one of interference with it. Bearing in mind the two primary objectives of the Model Law (respect for and preservation of party autonomy and ensuring procedural fairness), the courts do not review the merits of the arbitral tribunal's decision.* (Emphasis added.)

[72] Similarly, the Singapore Court of Appeal in *AKN and another v ALC and others and other appeals* [2015] SCD 107; [2015] 3 SLR 488 held as follows:

> 38 In particular, there is no right of appeal from arbitral awards. That is not to say that the courts can never intervene. However, *the grounds for curial intervention are narrowly circumscribed, and generally concern process failures that are unfair and prejudice the parties or instances where the arbitral tribunal has made a decision that is beyond the scope of the arbitration agreement. It follows that, from the courts' perspective, the parties to an arbitration do not have a right to a 'correct' decision from the arbitral tribunal that can be vindicated by the courts. Instead, they only have a right to a decision that is within the ambit of their consent to have their dispute arbitrated, and that is arrived at following a fair process.*

> 39 *In the light of their limited role in arbitral proceedings, the courts must resist the temptation to engage with what is substantially an appeal on the legal merits of an arbitral award, but which, through the ingenuity of counsel, may be disguised and presented as a challenge to process failures during the arbitration …* (Emphasis added.)

[73] With the aforesaid approach in mind, each of the issues presented shall now be considered.

EXCESS OF JURISDICTION

[74] The foundation of arbitration is rooted in the consent of the parties. In this regard, it is trite that the parties' consent to arbitrate and the scope of matters agreed to be submitted to arbitration are to be found in the parties' agreement. If the arbitral tribunal strays from the confines of its mandate as defined by the parties, it would have acted in excess of jurisdiction and its award is liable to be set aside. Indeed, in *Garden Bay Sdn Bhd v Sime Darby Property Bhd* [2021] 2 MLJ 281 at para [61], this court held as follows:

> [61] On the legal position, we agree that it is trite law that when parties refer their dispute to arbitration, *the mandate of the arbitrator must be limited to the terms defined by the parties for him to exercise his jurisdiction. If the arbitrator strays from the confines of this mandate, he will be acting in excess of his jurisdiction*, even though he may have the initial and primary jurisdiction to arbitrate between the parties. (Emphasis added.)

[75] The 's jurisdiction is also circumscribed and mandated by the law of the seat. As a tribunal seated in Malaysia, its decision-making process is circumscribed by the AA 2005, in particular, in our present case, s 30 of the AA 2005, which governs the arbitral tribunal's decision-making process, provides (where relevant) as follows:

> 30 Law applicable to substance of dispute
>
> (1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute.
>
> […]
>
> (4A) The arbitral tribunal shall decide according to equity and conscience only if the parties have expressly authorized it to do so.
>
> (5) The arbitral tribunal shall, in all cases, decide *in accordance with the terms of the agreement* and shall take into account the usages of the trade. (Emphasis added.)

[76] The relevance of s 30 of the AA 2005 to the arbitral tribunal's jurisdiction for purposes of setting aside an arbitral award was determined very recently by the Court of Appeal in *Hindustan Oil Exploration Co Ltd v Hardy Exploration & Production (India) Inc* [2023] 4 MLJ 113 (CA).

[77] In that case, this court held that although s 30 of the AA 2005 is not an 'actionable provision' per se, a conjunctive reading of ss 30 and 37 would be warranted where purely procedural aspects of the arbitration or the decision-making process are concerned. In other words, where the provisions of s 30 of the AA 2005 are transgressed and this impairs a procedural aspect of the arbitration or the decision-making process, this can be read conjunctively with s 37(1)(a) of the AA 2005 as a ground to set aside the arbitral award.

[78] More specifically, the question in *Hindustan Oil Exploration Co Ltd v Hardy Exploration & Production (India) Inc* was whether the time bar which arises from the expiry of statutory limitation periods is an issue of 'procedural admissibility' or an issue of merits or substance. In paras [68] and [69], the court held thus:

> [68] *The High Court in addressing the issue of time limitation must ask the more helpful question, that is 'whether the disputation is purely procedural or the disputation would also involve the question and examination of merits'.* To this court's mind, if a particular issue or disputation would remain unchanged notwithstanding the merits of a case, then that particular issue or disputation is purely procedural. Alike in an arbitral award involving time limitation, time limitation is a purely procedural issue that is entirely disjointed and unaffected by the merits of any parties' cases. *Time limitation is entirely blind to whether or not a party can prove any measure of liability against another.* Even if there was any form of civil wrong proven on merits, time limitation shall still prevail if the complaint of such civil wrong was not procedurally voiced out within the prescribed limitation period. Therefore, since time limitation is blind to the substance or merits of the case, it cannot at all be said that time limitation is a matter of substantive law. In this sense, this court is in full agreement with the learned JC's finding that time limitation is a matter of procedural law (and not of substantive law).
>
> [69] *A more meaningful expansion of the term 'admissibility' as propounded in the case of BBA v BAZ, would be 'procedural admissibility'. Thus, instead of embarking on a lengthy discourse on whether time limitation is a matter of admissibility or jurisdiction, it would be infinitely more helpful to determine whether time limitation is an issue of procedural admissibility or an issue of merit (or substance).* Thus, this court is inclined to adopt the expanded meaning of 'procedural admissibility', as opposed to the Singaporean court's classification exercise between a matter of admissibility or jurisdiction. Thus, this court does not entirely follow the test in *BBA v BAZ* to classify time limitation to either be a matter of admissibility or jurisdiction.
>
> [70] The more meaningful classification would be (as this court has previously stressed) is to classify whether or not the matter was purely a procedural issue (which remains unchanged and undisturbed notwithstanding the merits of the case) or a substantive issue (which is indubitably affected by the facts, evidence, and merits of the case). And clearly, time limitation is one procedural issue that is indeed blind to the merits of the case.
>
> [71] This manner of test and classification would effectively reconcile the appropriate approach to a time limitation issue in all aspects (in the face of the

differences between s 37 and the repealed s 42, and the Malaysian Federal Court's (in *Jan De Nul (M) Sdn Bhd & Anor v Vincent Tan Chee Yioun & Anor* [2019] 2 MLJ 413; [2019] 1 CLJ 1) classification of matters concerning the decision-making process (under s 37) and issue of law and fact which affects the parties' positions (under the repealed s 42).

[72] Nonetheless, *even if the High Court is clothed with the necessary jurisdiction to examine the arbitral tribunal's decision-making process (in applying time limitation), the High Court ought not to interfere with the arbitral tribunal's interpretation and application of the relevant time limitation if the arbitral tribunal's interpretation and application of time limitation is legally sound.*

[73] Notwithstanding the slight dissonance within the analysis and reasoning of the learned judicial commissioner, this court is still in agreement with the learned judicial commissioner's final conclusion that the issue of time limitation is purely and strictly a matter of curial or procedural law. Thus, the applicable law of time limitation shall be the governing procedural law of the seat of arbitration (that being the Malaysian law). (Emphasis added.)

[79] Accordingly, in *Hindustan Oil Exploration Co Ltd v Hardy Exploration & Production (India) Inc,* this court held that a plea of statutory time bar is to be treated as an issue of procedural law because the ability or otherwise of a party to prove *liability* of the claim will *not* affect the issue or disputation of the same. It makes no difference whether the applicable statute of limitations is classified as substantive (extinguishing the claim) or procedural (barring the remedy) in the private international law sense, since in both cases the complaint is that the claim is stale and therefore defective.

[80] However, the plea of statutory time bar, even if it is a procedural issue would not be one that goes towards the jurisdiction of the arbitral tribunal unless there is an express bar in the arbitration clause limiting the arbitral tribunal's jurisdiction to hear claims that are time-barred eg, 'the tribunal shall have no jurisdiction to hear claims that are time-barred under statute'. This is because the bringing of claims that are out of time under limitation laws in such a case would fall outside the scope of consent to arbitration. *Express provision by the parties is necessary given that statutes of limitation do not generally target or affect arbitral jurisdiction by design.*

[81] Indeed, in *Hindustan Oil Exploration Co Ltd v Hardy Exploration & Production (India) Inc,* the court opined that: '... even if the High Court is clothed with the necessary jurisdiction to examine the arbitral tribunal's decision-making process (in applying time limitation), the High Court ought not to interfere with the arbitral tribunal's interpretation and application of the relevant time limitation if the arbitral tribunal's interpretation and application of time limitation is legally sound'.

[82] The court by *obiter* opined that in some instances ie if the arbitral tribunal were to mistakenly apply the chosen substantive *lex contractus* under s 30 as the curial or procedural law (instead of the chosen *lex arbitri* or the law of the chosen seat of arbitration), the conjunctive readings of the provisions in ss 30(1), (2) and (5) and 37(1)(a)(v) may be resorted to remedy such a glaring error as to the appropriate procedural law to be applied which would make the arbitral award procedurally impaired.

[83] Accordingly, just because the arbitral tribunal decides a procedural issue under s 30(5) of the AA 2005, that does not transform it into a jurisdictional ruling at all. A jurisdictional ruling is narrower. It has to do with the arbitral tribunal's powers to hear the disputes.

[84] What then are the sources of the arbitral tribunal's powers or jurisdiction?

[85] Arbitration is a *consensual* dispute resolution process. The consent of the parties serves as the touchstone in determining the jurisdiction of the arbitral tribunal. In this regard, the scope of the parties' consent to the arbitral tribunal's jurisdiction is rooted in:

(a) the arbitration agreement:
A valid *arbitration agreement* is the primary source of jurisdiction. It reflects the parties' consent to exclude the court's original jurisdiction and to refer the disputes to arbitration. Without a valid arbitration agreement, the arbitral tribunal has no jurisdiction. It defines the scope of the disputes that can be referred for arbitration. Even if the main contract is alleged to be invalid, the arbitration agreement is treated as autonomous. It is the source as well as the limit of jurisdiction. If a dispute falls outside the terms of the clause, the arbitral tribunal has no authority;

(b) the terms of reference:
The terms of reference crystalise the specific claims. The parties' pleadings (statement of claim, defence, counterclaim and reply) define the issues referred for the arbitral tribunal's determination. The 's jurisdiction is not just a matter of the arbitration agreement in the abstract but is shaped by how the parties frame their disputes. For example, if both parties plead and submit on the effect of a limitation of liability clause, this may show that the issue is *within the arbitral tribunal's jurisdiction*, because the parties have *consented to have it determined by the* . Conversely, if a claim is advanced that was never pleaded, or a relief is granted beyond the submissions, the arbitral tribunal may have *acted beyond its jurisdiction.* In *PT Prima International Development v Kempinski Hotels SA and other appeals* [2012] SCD

179; [2012] 4 SLR 98, the Singapore Court of Appeal explained the distinction between the scope of an arbitration agreement and the scope of submission to arbitration (at para [32]) in this manner:

> ... It is plain that the scope of an arbitration agreement in the broad sense is not the same as the scope of submission to arbitration. The former must encompass the latter, but the converse does not necessarily apply, in that the particular matters submitted for arbitration may not be all the matters covered by the arbitration agreement. *The parties to an arbitration agreement are not obliged to submit whatever disputes they may have for arbitration. Those disputes which they choose to submit for arbitration will demarcate the jurisdiction of the arbitral tribunal in the arbitral proceedings before them.* (Emphasis added.)

(c) the law of the seat or *lex arbitri:*
Lex arbitri or the curial law means the law of the seat and this refers to the body of law that governs how the arbitration is conducted, ie the appointment and challenge of arbitrators, the tribunal's powers, interim measures, procedural timelines, setting aside awards and the role of the courts in supporting or supervising the arbitration. It governs the conduct of the arbitration process itself. Typically, the *lex arbitri* is the arbitration law of the seat of arbitration. So, if the seat of arbitration is Kuala Lumpur, our AA 2005 is the *lex arbitri,* regardless of the substantive governing law of the contract (which is the proper law of the contract or *lex causae*);

(d) party autonomy and agreement on the procedure:
In arbitration, party autonomy is the principle that the scope of the arbitral tribunal's jurisdiction, the rules it applies and the matters it decides are primarily determined by the agreement of the parties. It is often referred to as the cornerstone of arbitration. Just as the parties decide what disputes can be referred (eg 'all disputes arising out of or in connection with this contract'), the parties may also limit the arbitral tribunal's powers or jurisdiction (eg by including an exclusion clause that the arbitral tribunal has no power to award punitive damages or a limitation of liability clause that the arbitral tribunal has no jurisdiction to award a sum exceeding a certain amount). In Malaysia, prior to the amendment in 2018, parties may exclude the application of ss 41 and 42 of the Arbitration Act 2005, making the arbitral tribunal's jurisdiction as regards its finding of law as final and binding on the parties.

SETTING ASIDE ARBITRAL TRIBUNAL'S AWARD

[86] Since the jurisdiction of the is primarily defined by the arbitration agreement, the terms of reference, the *lex arbitri* and the principle of party autonomy, it follows that where the arbitral tribunal goes beyond those limits, its award may be set aside.

[87] More specifically, under our AA 2005, s 37(1)(a) provides that an award may be set aside if (iv) 'the arbitral award deals with a dispute not contemplated by or not falling within the terms of submission to arbitration' and or if (v) 'the arbitral award contains decisions on matters beyond the scope of the submission to arbitration'.

[88] These sections codify the principle that the arbitral tribunal's jurisdiction is limited by party autonomy and the arbitration agreement. So, if the arbitration clause covers 'payment disputes' but the arbitral tribunal decides on 'validity of patents', that decision deals with 'a dispute not contemplated by or not falling within the terms of submission' or if the arbitral tribunal is asked to decide on breach of contract but goes further to decide on damages for tortious misrepresentation when that is not pleaded or submitted, it would be making 'decisions on matters beyond the scope of the submission to arbitration'.

[89] It is trite and now beyond disputes that a distinction is made between a decision made by the arbitral tribunal that is an error within jurisdiction and that made outside its mandate or jurisdiction. Both our Federal Court and the Singapore Court of Appeal in the following decisions has established this distinction:

(a) *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals* [2018] 1 MLJ 1; [2018] 1 CLJ 693 where the Federal Court held at para [115]:

> [115] ... Since the setting aside of an award is a matter governed by AA 2005, the court is permitted to set aside an award only in manner prescribed by AA 2005. The court is not permitted to set aside an award in manner not prescribed by AA 2005. *'Error of fact or law on the face of the award' is not prescribed as a ground for court intervention. Hence, under AA 2005, there is no jurisdiction to set aside an award on the ground of 'error of fact or law on the face of the award'.* It is accepted that under AA 1952, the jurisdiction for court intervention stemmed from both common law and statute. But under AA 2005, 'the common law ground of setting aside an award for 'error on the face of the award' no longer exists' (The Arbitration Act supra at 8.23(b)). (Emphasis added.)

(b) *AKN and another v ALC and others and other appeals* [2015] SCD 107; [2015] 3 SLR 488 where at para [73] the learned Chief Justice Sundaresh Menon held:

> 73 In *CRW,* we noted (at [33]) *the distinction between the 'erroneous exercise by an arbitral tribunal of an available power vested in it (which would amount to no more than a mere error of law)' and the 'purported exercise by the arbitral tribunal of a power which it did not possess'.* This distinction had earlier been enunciated by Lord Steyn in the House of Lords decision of *Lesotho Highlands Development Authority v Impregilo SpA* [2006] 1 AC 221 (at [25]) as follows:

> Given the general importance of the point it is necessary to explain it in a little more detail. The reasoning of the lower courts, categorising an error of law as an excess of jurisdiction, has overtones of the doctrine in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 which is so well known to the public law field. It is, however, important to emphasise again that the powers of the court in public law and arbitration law are quite different. This has been clear for many years, and is now even more manifest as a result of the enactment of the [Arbitration Act 1996 (c 23) (UK)]. Sir Michael J Mustill (now Lord Mustill) and Steward Boyd QC (*Commercial Arbitration in England*, 2nd ed (1989), p 555) explained:
>
> *If … [the arbitrator] applies the correct remedy, but does so in an incorrect way — for example by miscalculating the damages which the submission empowers him to award — then there is no excess of jurisdiction. An error, however gross, in the exercise of his powers does not take an arbitrator outside his jurisdiction and this is so whether his decision is on a matter of substance or procedure.* (Emphasis added.)

[90] The legal effect of the distinction is that errors of law or fact made by the are still within its jurisdiction and the courts will not interfere because the arbitral tribunal's awards are meant to be final (see: ss 36 and 46 of the AA 2005) whereas decisions made exceeding jurisdiction, being made without the authority given by the parties may be set aside under s 37(1)(a)(iv) and (v).

APPLICATION OF S 30(5) TO S 37(1)(a)

[91] Now, under s 30(5) of the AA 2005, it is provided that the 'shall decide in accordance with the terms of the agreement and shall take into account the usages of the trade applicable to the transaction'. To my mind, this provision codifies the principle of party autonomy. Simply put, it stipulates that the arbitral tribunal must apply the contract as agreed by the parties.

THE QUESTION FRAMED BY THE APPELLANT ON ISSUE OF JURISDICTION

[92] The question for determination in this appeal as framed by the appellant is this whether in the case where the substantive agreement between the parties ie the contract, contains a limitation of liability clause and given that s 30(5) mandates the to decide in accordance with the terms of the agreement, namely, to apply the terms of the contract as written including the limitation of liability clause, this necessarily means that the 's jurisdiction to award any damages must be limited by the cap stipulated in the limitation of liability clause.

[93] In the context of the present case, article 34.3 of the contract provides as follows:

> Notwithstanding any other provision of this CONTRACT, the total liability of [GKL] to [SSPC] arising howsoever out of or in connection with the CONTRACT in respect of all claims, loss and/or expenses of every kind and nature whatsoever whether by way of indemnity or by reason of any breach of the CONTRACT (including without limitation any payment of Liquidated Damages) and/or in tort (including without limitation, negligence or gross negligence) or breach of any duty (statutory or otherwise), shall not exceed UNITED STATES DOLLARS TWO HUNDRED MILLION (USD200,000,000) in aggregate. The provision of this Article shall not apply to any indemnities given by [GKL] under Article 29 headed INSURANCE BY [GKL], Article 23 headed TAXES AND TAX EXEMPTION CERTIFICIATES, Article 27 headed PATENTS AND OTHER PROPRIETARY RIGHTS, Article 28 headed LIABILITES AND INDEMNITIES, Article 32 headed CONFIDENTIALITY and Article 30 headed PERMITS, LAWS AND REGULATIONS.

[94] Thus, it is contended on behalf of the appellant that because article 34.3 stipulates the appellant's liability in respect of 'any claims howsoever arising is capped at USD200m and because the has awarded the sum of USD422m, the award has exceeded the mandate of the arbitral tribunal under s 30(5) making it vulnerable to be set aside under s 37(1)(a)(iv) and (iv) of the AA 2005.

[95] To my mind, the answer to the question put before this court depends very much on whether the limitation of liability clause in this case was treated by the parties as a *jurisdiction constraint* on the 's jurisdiction.

[96] There is no question that the jurisdiction of the flows from the arbitration agreement in the contract. In this case this would be article 36 which stipulates thus:

> 36.1 Any dispute, controversy or claim relating to, arising out of, or in connection with the WORK or the CONTRACT including any dispute as to the construction, validity, interpretation, enforceability or breach of the CONTRACT shall first be resolved by means of the following procedure:
>
> (a) the dispute shall initially be referred to the COMPANY REPRESENTATIVE and the CONTRACTOR REPRESENTATIVE who shall meet to discuss the matter in dispute and make all reasonable efforts to reach an agreement;
>
> (b) If no agreement is reached under Clause 36.1(b) the dispute shall be referred to the Managing Directors of the COMPANY and the CONTRACTOR.
>
> 36.2 In the event no agreement is reached pursuant to Clause 36.1 above, the COMPANY and the CONTRACTOR hereby agree that any dispute which arise in connection with the activities contemplated in the CONTRACT on the application, implementation, validity, breach or termination of all or any part of the

WORK or any provision thereof (whether resulting from a claim in contract, tort or otherwise) shall be finally and exclusively settled in accordance with the UNCITRAL (United Nations Commission on International Trade Law) Arbitration Rules as applied by the Regional Centre of Arbitration at Kuala Lumpur, Malaysia. The place of arbitration shall be the Regional Centre for Commercial Arbitration, Kuala Lumpur. The number of arbiters shall be three (3) and the third arbitrator shall always be a suitably qualified and experienced lawyer.

36.3 The language to be used in the arbitration proceedings shall be English.

36.4 Notwithstanding the foregoing, the parties may agree to refer any disputes to a person or a body possessing expert knowledge, if it is considered, in view of the nature of such dispute, to be more suitable than resorting to arbitration. Such a person or a body shall then be appointed by mutual agreement, and the place of proceedings and determination shall be Kuala Lumpur and the language to be used shall be English. Any decision of such a person or a body shall be final and binding upon the parties concerned.

36.5 Whilst any matter or matters are in dispute except where either party has terminated or purported to terminate the CONTRACT, the CONTRACTOR shall proceed with the execution and completion of the WORK and both the CONTRACTOR and the COMPANY shall comply with all the provision of the CONTRACT.

[97] Article 34.3 is but one of the many clauses in the contract. With respect to learned counsel for the appellant, I am unable to agree that a limitation of liability clause, or for that matter even an exclusion of liability clause, is to be treated as a jurisdictional clause that must be read *together* with the arbitration clause in the contract. This is so regardless of the fact that the parties may have engaged in extensive negotiations and risk management exercises before settling on the limitation of liability clause in the contract. The aforesaid cannot and ought not to change the principles of contractual interpretation normally applied by the courts and arbitral tribunals when considering the meaning and scope of the clause.

[98] To my mind, an exclusion or limitation of liability clause, however carefully and or hotly negotiated, is still a substantive defence available to the parties to the contract, namely, it serves to govern the extent of liability of the parties. It does not have any bearing on the arbitral tribunal's jurisdiction to hear the disputes at all. In this regard, learned counsel for the appellant had referred this court to the introductory paragraph of Teare J's judgment in *Seadrill Ghana Operations Ltd v Tullow Ghana Ltd* [2019] 1 All ER (Comm) 34 at para [1] where he commented that because drilling for oil is a risky business, oil companies would seek to protect themselves from the financial consequences of risks by appropriate clauses in the contract, for example by a force majeure clause. That comment, with respect, does not assist the appellant's case at all. It has nothing to do with the issue before this court.

[99] Further, the fact that article 34.3 is expressly drafted as taking precedence over all other terms of the agreement by the words 'Notwithstanding any other provision of this Contract, ...' and is also drafted in broad terms as regards the limit on the amount of liability that can be awarded by the by the words '... the total liability of [the appellant] to [the respondent] arising howsoever out of or in connection with the CONTRACT in respect of all claims, loss and/or expenses of every kind and nature whatsoever whether by way of indemnity or by reason of any breach of the CONTRACT ... and/or in tort ... or breach of any duty ... shall not exceed [USD200 million] in aggregate', also to my mind, do not and cannot transform the said clause into a jurisdictional clause at all.

[100] The scope of a limitation of liability clause, no matter how widely drafted, is, at the end of the day, a substantive defence to the claim and does not cut into the jurisdiction of the . Unless the arbitration agreement expressly or otherwise limits the 's jurisdiction to award damages up to a certain maximum sum, a limitation of liability clause that is found in the terms of the contract does not strip the of its jurisdiction over claims above the sum stated in the clause. There is no question that the has the jurisdiction to hear the claims, but it must determine the same by interpreting the limitation of liability clause to see whether the claims fall within or outside the clause, and if the cap applies to those claims. A substantive interpretative error of the clause is not a jurisdiction defect because the jurisdiction flows from the arbitration agreement and *not* from the limitation clause.

[101] Put it in another way, the 's jurisdiction is defined by the scope of the arbitration agreement as regards what disputes are referred, the terms of reference, and any applicable statutory limits. The exclusion or limitation of liability clause does not of itself oust or limit the jurisdiction of the , but merely constrains the remedies or quantum of reliefs that the may award once it determines liability and whether the exclusion or limitation clause applies to the claims.

[102] The position is different if the parties have expressly restricted the 's jurisdiction in the arbitration agreement that it has only a mandate to award damages up to a certain agreed cap, for example, where the parties agree that the is to arbitrate their disputes, *but shall have no jurisdiction to award damages beyond [X] sum.* Alternatively, the arbitration agreement may incorporate the limitation of liability clause as part of the submission to arbitration, for example, where the parties agree to the to decide on disputes *subject to and within the limits of the liability as agreed in Clause [X]'* (where the said clause sets out the limit without any qualifications).

[103] In the absence of such clear drafting, a limitation of liability clause or

even an exclusion clause remains a matter of substantive defence and comes under the merits of the disputes and not jurisdiction at all. In other words, article 34.3 in this case remains as a contractual term that the must apply under s 30(5) of the AA 2005, and if the misinterprets the same, this only leads to an error on the merits and within the 's jurisdiction rather than exceeding its jurisdiction.

[104] Quite clearly, the case before us is not one where the limitation of liability clause has been framed as a restriction on the 's remedial powers where the clause directly curtails the 's mandate. It is also not one where the arbitration agreement itself incorporates the limitation as part of the reference, thereby imposing a cap on the boundary of submission. Indeed, there is no evidence that the parties had agreed under the principle of party autonomy that the 's jurisdiction to award damages cannot exceed USD200m.

[105] To be clear, this is not a case where the had totally disregarded altogether article 34.3. Arguably, if the had simply ignored the limitation of liability clause under article 34.3 without any reasoning (as oppose to considering it and interpreting it in a certain manner), it can be contended that the had breached s 30(5) of the AA 2005 as it would not have decided the disputes in accordance with the terms of the agreement. Such omission can potentially transform what would otherwise be a merit error into an excess of jurisdictional error under s 37(1)(a)(iv) and (v). We are not dealing with such a case here.

ARTICLE 34.3 EXPRESSLY REFERRED FOR ARBITRAL TRIBUNAL'S INTERPRETATION

[106] Indeed, the facts in the present case even exclude this court from entertaining the possibility that the parties had by *implication* intended article 34.3 to be incorporated as part of the submission to arbitration or in the arbitration agreement. It is not disputed and in fact it is an undeniable fact that the parties had in this case *expressly submitted the interpretation, scope and the application of article 34.3 to the for its determination.* In fact, the parties had never even asserted before the that article 34.3 itself curtailed its jurisdiction to award in excess of USD200m. Instead, the parties had submitted before the on their respective interpretations of the scope of article 34.1 and 34.3, as to whether the respondent's claims for damages ought to be limited by reason of the clauses. The following excerpts from the award will make this abundantly clear:

> Issue 2: Whether the claim for compensatory damages is excluded under Article 34.1 of Section II of the Contract.
>
> GKL's submissions

3202. GKL submits that any loss suffered by SSPC would be excluded by Section II Article 34.1 of the Contract, which expressly excludes consequential loss. GKL refers to paragraph 624 of the Statement of Defence and Counterclaim where SSPC set out the consequences of the staggered start-up and how 'any *gas flared is a lost commercial opportunity that can never be recovered*'.

3203. GKL submits that this falls squarely within the purview of Article 34.1, which covers, amongst other things, 'any indirect or consequential losses, any loss of use of property or loss of production, revenue, profit or anticipated profit or loss of contracts suffered by the COMPANY GROUP, its contractors or PETRONAS howsoever caused arising in connection with the performance of the CONTRACT (except to the extent of any Liquidated Damages provided for in the CONTRACT).'

3204. *GKL also submits that even if not excluded by Article 34.1, any claim would fall under Section II Article 34.3 of the Contract, the limitation of liability clause. In those circumstances, this Head of Claim, together with SSPC's other claims, is capped at a limit of USD200 million.*

SSPC's submissions

3205. SSPC submits that this claim has nothing to do with consequential damages, such as loss of production or loss of revenue. It is a simple compensation for the fact that SSPC received the use of a Semi-FPS which is less valuable than the Semi-FPS that it should have received under the Contract. SSPC submits that it is claiming compensation for not receiving the Semi-FPS that it was promised and for which it paid.

Tribunal's decision

3206. The loss which SSPC claims as damages is an abatement of the Semi-FPS day rate because it says that during the period when the Semi-FPS was operating without seawater and gas injection, the loss of use of those injection systems meant that the value of the Semi-FPS was less than it would have been had it been able to use those injection facilities.

3207. This is not a claim for the cost of remedying the seawater and gas injection systems so that they could operate, it is a claim for diminution in the value of the Semi-FPS because SSPC was unable to use those injection systems.

3208. In common law the reference to *'indirect'* or *'consequential'* loss is generally to be distinguished from *'direct'* loss which naturally arises from a breach as considered in the classic case of *Hadley v Baxendale* (1854) 9 Ex 341. Where a person receives something less than contracted for the measure of damages could either be the *cost* of providing the full contractual performance or the diminution in the value of the item contracted for. In this case, the Tribunal does not consider that the diminution in value of the Semi-FPS can be described as an indirect or consequential loss. It is the normal measure of loss where a party is provided with something less than contracted for.

3209. The *exclusion* clause also excludes 'any *loss of use of property.* The use of the word 'any' indicates, in the Tribunal's view, that this does not need to be indirect

or consequential loss. In this case the diminution in value of the Semi-FPS arises because there was a loss of use of the seawater and gas injection facilities. The fact that there were not those facilities meant that SSPC had to proceed to achieve CoCP without being able to use the seawater and gas injection systems which were to be part of the Semi-FPS. The Tribunal therefore finds that the type of loss which SSPC seeks to claim as an abatement of the Semi-FPS day rate can properly be described as *'loss of use of property,* the property being the injection facilities and the claim being based on the loss of use of those facilities.

3210. GKL also submits that the claim is excluded because the loss amounts to a claim for loss of production. The way in which the claim is put is not for a claim for the loss of production of oil or gas which would arise because SSPC were unable to use the seawater or gas injection facilities. As a result, the Tribunal does not find that the loss would have been excluded as a loss of production. Nor does the Tribunal consider that any other part of Section II Article 34.1 would apply to exclude the claim.

3211. As a result, the Tribunal concludes that SSPC's limited functionality claim fails because the head of damages sought by SSPC is excluded by Section II Article 34.1 of the Contract.

[107] The effect of the parties' aforesaid conduct in the arbitral proceedings is that the parties, particularly the appellant, had expressly and incontrovertibly submitted the interpretation, scope, and application of article 34.3 to the arbitral tribunal, recognising that the arbitral tribunal had jurisdiction to decide on the limitation of liability issue. This effectively turned the dispute on article 34.3 into one of merits and an issue of interpretation and not jurisdiction (for completeness, article 34.1 deals with the exclusion of liability for consequential losses).

[108] Accordingly, it is the judgment of this court that the contention that article 34.3 has the legal effect of placing a jurisdictional constraint on the arbitral tribunal's mandate is unsustainable and must be rejected. Once the parties put the limitation of liability clause in issue, its meaning and effect are part of the matters submitted to the arbitration. This means that the 's ruling on article 34.3, whether correct or erroneous, is an exercise of jurisdiction and not in excess of jurisdiction at all.

[109] Verily, the appellant cannot remain silent on the jurisdiction of the , submitted fully on the merits, and when the decision turns out to be unfavourable to them, now seeks to claim that the award made is in excess of jurisdiction. I hold that it is simply impermissible for the appellant to seek to recharacterise article 34.3 as a jurisdictional bar only after being unsuccessful in persuading the to accept its interpretation of its scope. It is clearly an afterthought and must be rejected.

[110] Where a question that had been specifically posed to the arbitral tribunal for determination and the arbitral tribunal had made a decision on the question, the same can no longer be amenable to curial intervention. This principle that has come to be known as the *Absalom* exception and has been referred by our Federal Court in *The Government of India v Cairn Energy India Pty Ltd & Anor* [2011] 6 MLJ 441 where at para [30] it was held as follows:

> [30] With respect we are not persuaded that we should depart from the long line of authorities holding such a distinction. *Thus, where a specific matter is referred to arbitration for consideration, it ought to be respected in that 'no such interference is possible upon the ground that the decision upon the question of law is an erroneous one*. However, if the matter is a general reference, interference may be possible 'if and when any error appears on the face of the award' (see: *Sharikat Pemborong Pertanian). (See also: King v Duveen* [1913] 2 KB 32 and *Absalom Ltd v Great Western (London) Garden Village Society, Ltd* [1933] AC 592). (Emphasis added.)

Richard Malanjum CJ (Sabah and Sarawak) further observed there as follows:

> [52] *We note that the arbitrators were faced with a question on the construction of a clause in an agreement. From the reading of it, no doubt it could be given two interpretations — one in favour of the appellant and one in favour of the respondents. For that very reason, the matter was sent for arbitration. The fact that the learned arbitrators took one approach in interpretation (which was in favour of the respondents) over the other cannot be a ground for challenge*.
>
> [51] And as Scrutton LJ put it *'... if you refer a matter expressly to the arbitrator and he makes an error of law you must take the consequences; you have gone to an arbitrator and if the arbitrator whom you choose makes a mistake in law that is your look-out for choosing the wrong arbitrator; if you choose to go to Caesar you must take Caesars's judgment'* (see *African & Eastern (Malaya) Ltd v White, Palmer & Co Ltd* (1930) 36 LI L REP 113; cited with approval by the Court of Appeal in *Dato' Teong Teck Kim & Ors v Dato' Teong Teck Leng* [1996] 1 MLJ 178 ... (at p 452).

[111] The aforesaid is all the more so when the appellant had in this case expressly agreed at the outset that the provisions in the Arbitration Act 2005, which permit parties to refer error of law by the to be referred to court for review are to be excluded, thus agreeing to accept the 's finding of law as final and binding.

[112] Accordingly, whilst the must decide according to the terms of the agreement including article 34.3 under s 30(5) of the AA 2005, once the parties have expressly submitted the article 34.3 to the for its determination, an error of interpretation, if any, is an error within jurisdiction and by reason of the same, s 37(1)(a)(iv) and (v) simply have no application at all.

INVITATION TO REVIEW ARBITRAL TRIBUNAL'S INTERPRETATION OF ARTICLE 34.3

[113] Additionally, the appellant also invited this court to review whether the 's exercise of its jurisdiction was in accordance with article 34.3 of the contract, in other words, to *review* the correctness or otherwise of the 's interpretation of article 34.3. The appellant contended that this exercise be conducted in the interests of fairness and justice. Were the court to conclude that the misinterpreted its jurisdiction as delimited by article 34.3, then justice would be served by this court righting that wrong.

[114] The in its interpretation of article 43.3 had found that the limitation clause is only applicable 'in respect of all claims, loss and or expenses of every kind and nature whatsoever' only where the same were '... by way of indemnity or by reason of any breach of the contract (including without limitation any payment of Liquidated Damages) and or in tort (including without limitation, negligence or gross negligence) or breach of any duty (statutory or otherwise)'. The found that the work claims did not fall within these categories and were therefore not subject to the limitation clause.

[115] To accept the invitation to undertake a review of the 's decision on its interpretation of article 34.3 is to ask this court to act beyond what the AA 2005 permits. Our AA 2005 is based on the UNCITRAL Modal Law, and it provides a narrow and exhaustive grounds for setting aside an award. AA 2005 does not provide for a general appeal on a point of law, and the Courts certainly cannot review the merits of the 's decision under the guise of a jurisdictional challenge. In this regard, our Federal Court in *Master Mulia Sdn Bhd v Sigur Rus Sdn Bhd* [2020] 12 MLJ 198; [2020] 9 CLJ 213 at para [54] has held as follows:

> [54] ... The role of the courts in the arbitral regime in general is one of assistance supportive of the arbitral process and not one of interference with it. *Bearing in mind the two primary objectives of the Model Law (respect for and preservation of party autonomy and ensuring procedural fairness), the courts do not review the merits of the arbitral tribunal's decision. ...* (Emphasis added.)

[116] If this court were to undertake a review, this would amount to the court arrogating to itself an appellate power which the AA 2005 deliberately excludes by the repeal of the old s 42. The amendment to the AA 2005 (vide Arbitration (Amendment) (No 2) Act 2018) by repealing s 42 of the AA 2005 was clearly intended by Parliament to strengthen the sanctity and inviolability of an arbitration award to ensure the finality and conclusiveness of all arbitral awards, that they can no longer be challenged on the ground that the had fallen into error of law.

[117] Indeed, in this case, the parties themselves have expressly agreed to exclude the application of ss 41, 42, 43, and 46 of the AA 2005 in the arbitration. Having agreed to exclude the court exercising such review powers on a question of law, it is no longer open to the appellant to challenge the award on the basis that the had fallen into error of law and inviting this court to review the arbitral tribunal's interpretation of article 34.3.

[118] The principle accepted in all Modal Law jurisdictions is that the arbitral tribunal has the jurisdiction to interpret the limitation clause, and a wrong interpretation, even if 'obviously wrong', is an interpretational error and is not a jurisdictional defect at all. At this juncture, it may be apt to remind ourselves again what the Federal Court said in the case of *Pancaran Prima Sdn Bhd v Iswarabena Sdn Bhd and another appeal* [2021] 1 MLJ 1; [2020] 9 CLJ 466 at paras [8] and [9] as follows:

> [8] Section 8 of the Act enshrines the principle of *minimal interference by the court*, which is an ingrained aspect of the United Nations Commission on International Trade Law (UNCITRAL) Model on International Commercial Arbitration
>
> [9] This court in the recent case of *Jan De Nul (M) & Anor v Vincent Tan Chee Yioun & Anor* [2019] 2 MLJ 413 made the following observations on the effect of ss 8, 9, 37 and 42 of the Act:
>
> > The effect of ss 8, 9, 37 and 42 of the AA 2005 is that the court should be slow in interfering with or setting aside an arbitral award. *The court must always be reminded that constant interference of arbitral award will defeat the spirit of the AA 2005 which for all intent and purposes, is to promote one-stop adjudication in line with the international practice.* ... In this regard, the court needs to recognise the autonomy of the arbitral process by encouraging finality; and its advantage as an efficient alternative dispute resolution process should not be undermined.

POLICY CONSIDERATION

[119] In fact, it is necessary to also caution why, as a matter of policy, this court should not treat the exclusion and or limitation of liability clause in an agreement as a jurisdictional constraint to the 's jurisdiction as contended by learned counsel for the appellant and or to undertake a review of the 's interpretation of the clause. To do so will undermine the principle of finality of arbitration, which is an established and entrenched doctrine under the Modal Law that Malaysia has adopted. This is precisely the reason why our Federal Court and all courts in countries adopting the Modal Law routinely emphasised the narrow approach to 'excess of jurisdiction', confining it to matters not submitted before the . The Federal Court case of *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals* [2018] 1 MLJ 1; [2018] 1 CLJ 693 makes this very clear at para [115] of the judgment, stating as follows:

> [115] ... Since the setting aside of an award is a matter governed by AA 2005, *the court is permitted to set aside an award only in manner prescribed by AA 2005. The court is not permitted to set aside an award in manner not prescribed by AA 2005. 'Error of fact or law on the face of the award' is not prescribed as a ground for court intervention. Hence, under AA 2005, there is no jurisdiction to set aside an award on the ground of 'error of fact or law on the face of the award'. It is accepted that under AA 1952, the jurisdiction for court intervention stemmed from both common law and statute. But under AA 2005, 'the common law ground of setting aside an award for 'error on the face of the award' no longer exists'* (The Arbitration Act supra at 8.23(b)). (Emphasis added.)

[120] If exclusion and limitation of liability clauses are treated as jurisdictional instead of substantive, as contended, it would mean that every alleged 'mis-interpretation' of such clauses, which are common in most contracts, can now be framed as a 'jurisdictional excess'. This opens the door for courts to review arbitral reasoning under the guise of jurisdiction. Arbitration rests on finality. If contractual defences like the exclusion and limitation of liability clauses are jurisdictional, any dissatisfied party could routinely challenge the awards under s 37 of the AA 2005, eroding the arbitral efficiency. Limitation clauses go to quantum and liability and not to the power to hear the disputes. Recasting the substantive interpretative disputes as jurisdictional issues would destroy the distinction leading to judicial review beyond what the Modal Law allows. This will open the door to parties, having argued the limitation clauses as substantive issues before the , and if they lose, re-characterise the same arguments as jurisdictional objections in the courts. This only creates uncertainty, encourages tactical delay, and undermines party autonomy. This court will be expanding court intervention beyond the parameters currently accepted by courts of countries that have adopted the Modal Law. More significantly, this will also turn away parties from considering Malaysia as the seat for arbitration and undermine the efforts to promote Malaysia as a one-stop centre for arbitration. To quote Ramly Ali FCJ in *Jan De Nul (M) Sdn Bhd & Anor v Vincent Tan Chee Yioun & Anor* [2019] 2 MLJ 413 at 429, para [57]:

> [57] The court must evaluate the nature and impact of the particular breach in deciding whether the award should be set aside under s 37. *The court must also consider the background policy of encouraging arbitral finality and minimalist intervention approach to be adopted in line with the spirit of UNCITRAL Model Law. The effect of ss 8, 9, 37 and 42 of the AA 2005 is that the court should be slow in interfering with or setting aside an arbitral award. The court must always be reminded that constant interference of arbitral award will defeat the spirit of the AA 2005 which for all intent and purposes, is to promote one-stop adjudication in line with the international practic*e (see: *Ajwa For Food Industries Co (MIGOP), Egypt v Pacific Inter-Link Sdn Bhd & another appeal* [2011] MLJU 1537; [2013] 2 CLJ 395; *Taman Bandar Baru Masai Sdn Bhd v Dindings Corporations Sdn Bhd* [2009] MLJU 793; [2010] 5 CLJ 83; and *Lesotho Highlands Development Authority v Impregilo SpA and others* [2005] UKHL 43). In this regard, *the court needs to*

recognise the autonomy of the arbitral process by encouraging finality; and its advantage as an efficient alternative dispute resolution process should not be undermined. (Emphasis added.)

[121] The principle of minimal curial intervention being treated as the mainstay of the Modal Law is reiterated also by the Singapore Court of Appeal in *AKN and another v ALC and others and other appeals* [2015] SCD 107; [2015] 3 SLR 488, where at para [37], Chief Justice Sundaresh Menon stated as follows:

> 37. *A critical foundational principle in arbitration is that the parties choose their adjudicators. Central to this is the notion of party autonomy. Just as the parties enjoy many of the benefits of party autonomy, so too must they accept the consequences of the choices they have made. The courts do not and must not interfere in the merits of an arbitral award and, in the process, bail out parties who have made choices that they might come to regret, or offer them a second chance to canvass the merits of their respective cases. This important proscription is reflected in the policy of minimal curial intervention in arbitral proceedings, a mainstay of the Model Law and the IAA* (see *BLC v BLB* [2014] 4 SLR 79 ('BLC') at [51]–[53]). (Emphasis added.)

[122] It is therefore unsurprising that whilst learned counsel for the appellant has cited many cases before this court, none of the cases in fact support his proposition made before us. The case of *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763 at [159] per Lord Saville cited by learned counsel for the appellant, is, with respect, of no assistance to the issue. That was a case where the defendant had challenged the enforcement of the arbitral award on the ground that he was never a party to the arbitration agreement. The English Supreme Court quietly rightly held that, notwithstanding that an arbitral tribunal is competent to rule on its jurisdiction, it cannot be the final arbiter of its own jurisdiction. That would be a 'classic case of pulling oneself up by one's own bootstraps'. Thus, whether the arbitrators had jurisdiction when they made the findings of fact and their view of the law as to whether the defendant was a party to the arbitration agreement under which the award was made, was a matter that in enforcement proceedings the court must consider for itself *de novo.* The case has nothing to do with whether a limitation of liability clause is to be treated as a jurisdictional constraint to the arbitral tribunal at all.

[123] Similarly, the cases of *Albion Energy Ltd v Energy Investments Global BRL* [2020] EWHC 301 (Comm) at paras [22]–[29], *H v G* [2022] HKCU 2213; [2022] HKCFI 1327 at paras [17]–[39], *Transocean Offshore International Ventures Ltd v Burgundy Global Exploration Court* [2010] SCD 31; [2010] 2 SLR 821; [2010] SGHC 31 at paras [21]–[27] and *PT Thiess Contractord Indonesia v PT Kaltim Prima Coal & Standard Chartered Bank, Singapore Branch* [2011] EWHC 1842 (Comm) at paras [35]–[44] cited by

the appellant involved completely different factual scenarios. In those cases, the courts were dealing with two different dispute resolution clauses under two different agreements, and the issue was whether the parties had intended for the different dispute resolution mechanisms to deal only with the specific disputes arising from each of the agreements. At the end of the day, whether a jurisdiction clause applies to a dispute is a question of construction. Where there are numerous jurisdiction agreements which may overlap, the parties must be presumed to be acting commercially, and not to intend that similar claims should be the subject of inconsistent jurisdiction clauses. There is no presumption that a jurisdiction or arbitration agreement in one contract, even if expressed in wide language, is intended to capture disputes arising under another contract.

[124] Suffice it to say that in the present case, there is absolutely no basis to suggest that the parties had intended by article 36 that the jurisdiction of the arbitral tribunal to award damages was limited to only the sum stated in article 34.3. Contrary to the contention of counsel for the appellant, the parties had not made article 34.3 a jurisdictional limiting clause at all. Indeed, no authorities have been cited in support of such a contention.

[125] For the above reasons, the contention that the had exceeded its jurisdiction when it awarded damages in excess of USD200m is wholly without any merit and is hereby rejected.

ACCOMMODATION VESSELS COSTS

[126] The respondent's accommodation vessels costs were for USD151,550,814.49 in costs incurred in relation to, among others, the hiring of two accommodation vessels, namely, the Lewek Crusader and Lewek Champion to accommodate personnel on board the Semi-FPS.

[127] According to the respondent, these costs were necessary due to the increased onshore carry-over scope and prolonged period of defects remediation. This was the single largest head of claim amongst the respondent's counterclaims against the appellant in the arbitration.

[128] On the issue of the accommodation vessels costs, the appellant contended that in determining the respondent's claim for the costs of hiring two accommodation vessels ('AV') ('SSPC's AV claim'), the acted in breach of natural justice and in breach of public policy in three respects:

(a) firstly, the made a legal and factual finding on the meaning of a production sharing contract ('PSC') between PETRONAS and the respondent, to which the appellant was not privy, and which was extraneous to the arbitration in that it was never produced in evidence

and the appellant never had the opportunity to review it ('non-production of PSC');

(b) secondly, the 's award sanctioned a double recovery of the AV costs and unjust enrichment of the respondent, in circumstances where the respondent's witness had admitted that the respondent had recovered the AV costs ('double recovery'); and or

(c) thirdly, the undertook to assess the proportion of AV costs attributable to the appellant, where this assessment was arbitrary, and the parties had not been given the opportunity to submit on the appropriate proportion ('arbitrary apportionment').

NON-PRODUCTION OF PSC

[129] In relation to the non-production of PSC, the appellant claimed that the in awarding the respondent's claim for accommodation vessels on the basis that the PSC did not prevent the respondent to recover the same and further that the accounting procedures between PETRONAS and the respondent also did not affect the claims *without* the respondent producing the SPC document before the arbitral tribunal had resulted in a breach of natural justice as the non-production of the PSC had deprived the appellant of a full opportunity to present its case on every point in issue including the contention that the respondent had already recovered the costs from PETRONAS.

[130] The appellant claimed that the learned High Court judge had erred in not finding a denial of natural justice occasioned by the non-disclosure of the PSC contract.

[131] More specifically, the appellant contended that the arbitral tribunal's factual findings on this issue turned on the meaning and effect of the PSC and the content of its terms; the PSC was the key document on this issue. The appellant claimed that it had no opportunity to make submissions or cross-examine witnesses on the meaning and effect of the PSC and the factual assertions being advanced by the respondent about the PSC, that the arbitral tribunal ultimately credited, because the PSC had been withheld by the respondent and was not in evidence.

[132] With respect, I see no merit in the appellant's contention.

[133] The principle of natural justice requires that parties be given a fair opportunity to address material relied upon by the tribunal. In *Master Mulia Sdn Bhd v Sigur Rus Sdn Bhd* [2020] 12 MLJ 198; [2020] 9 CLJ 213, the Federal Court held at paras 60 and 62 thus:

[60] ... *We are therefore in agreement with the views expressed by the Court of Appeal in*

paras [90]–[92] of the written judgment: that without these two pieces of extraneous evidence which were never put to the parties, the arbitration would also have reached a different outcome. As such, the Court of Appeal was correct in setting aside the entire award on the basis that the breach had materiality and causative effect on the outcome of the arbitration. On the established facts and on a perusal of the evidence on the appeal record, we are satisfied that the High Court judge erred and that appellate intervention was warranted.

...

[62] ... *As stated a mere finding of a breach of the rules of natural justice is in itself insufficient. It must be shown that the breach was significant or serious such as to have an impact on the outcome of the arbitration.*

Prejudice, though, a relevant consideration, is not a requirement.

[134] To my mind, that requirement was met here because both parties had advanced submissions on the PSC, and the had evaluated those submissions before coming to its award. The mere fact that the PSC was not tendered as an exhibit cannot amount to reliance on extraneous material at all since the , in coming to its conclusion on the relevance of the PSC, was merely resolving arguments presented by the parties themselves.

[135] There is no dispute that the appellant had pleaded and submitted on the PSC. By doing so, the appellant had voluntarily put the PSC into issue and invited the to consider it, notwithstanding that the appellant did not take steps to compel production of the document through discovery.

[136] In its statement of reply and defence to counterclaim, the appellant had specifically alluded to the issue of double recovery under the respondent's contract with PETRONAS:

30. Under the construction and lease arrangement, the Claimant / MISC would have financed the entire construction of the SEMI-FPS and would have assumed all the risks involved in this construction. The Claimant / MISC would have borne the capital expenditure including the costs of construction, procurement, manpower, warranty and insurance. On the other hand, the Respondent would not bear any of this upfront capital outlay and risk. Instead, the Respondent would make monthly payments of the SEMI-FPS DAY RATE over the 15-year period for the exclusive use of the SEMI-FPS. Further, the Respondent's payments of the SEMI-FPS DAY RATE would be recoverable through the Respondent's cost recovery arrangement with PETRONAS.

515. The Claimant understands that the Respondent has an arrangement with PETRONAS whereby the Respondent can claim "cost recovery" for sums incurred in connection with the SEMI-FPS. The Claimant requires the Respondent to prove that it is not making a double recovery in respect of any of the costs which it claims in the SDCC and/or Exhibit [R-132].

[137] This was followed by the respondent's statement of rejoinder and defence to the counterclaim, wherein again the cost recovery mechanism with PETRONAS was pleaded:

7.1.4 GKL falsely suggests double dipping

734. GKL suggests – but again without providing any form of substantiation – that SSPC is making double recovery of the costs incurred for completing the SEMI-FPS. In this respect, GKL asserts that SSPC can in any event claim cost recovery for sums incurred in relation to the SEMI-FPS.[588] However, this is not how this works. First of all, any compensation received from GKL will be taken into account in cost recovery from PETRONAS. Cost recovery vis-à-vis PETRONAS covers the actual costs of the project and does not provide SSPC with a claim for costs that have been recovered from the party that is actually responsible and liable for them. Second, cost recovery from PETRONAS will never be a full cost recovery. In any event, GKL as the contractor being responsible for the defects cannot expect that somebody else picks up the tab for remediation of the defects for which GKL is responsible.

[138] After the pleadings phase, the appellant's own witness, Mr Abu Fitri, alluded in his witness statement to the respondent's cost recovery of the accommodation vessel from PETRONAS, referring to his understanding that the accommodation vessel claimed by the respondent was cost recovered from PETRONAS through the cost-sharing mechanism under the PSC:

> 12. Although SSPC indicated its opinion that there was no need for an AV if there was no offshore carryover work (see PowerPoint presentation to ISC of 1 November 2012 **[AF-2]**), I considered that to be a self-serving statement. SSPC did not want to be put into a situation where it had to pay for the AV. My understanding of SSPC's motivations was that SSPC wanted to ensure that either it could recover the costs of the AV from Petronas under the costs recovery mechanism in SSPC's agreement with Petronas; or to set itself up to claim back the cost of the AV from GKL.
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> 18. Given that SSPC knew long before the parties signed the Contract on 9 November 2012 that SSPC was going to hire an AV, if SSPC genuinely thought that the AV was going to be for GKL's account, SSPC could and should have negotiated this into the Contract. If SSPC considered that the AV which SSPC unilaterally negotiated for and hired was required to carry out GKL's work, SSPC should have expressly added the hiring of an AV into GKL's Scope of Work in the Contract. SSPC did not do so and I can only conclude that this was because the original purpose of hiring the AV was to carry out SSPC's subsea installation work. Seeking to claim back for the AV against GKL appears to have been an afterthought, which came to SSPC when it became clear that it was not going to be able to obtain costs recovery for the AV from Petronas beyond the first four months.

[139] Further, the appellant's witness Mr Milan Hendrikse (whom the appellant had claimed in its closing submissions to have been surprised by his oral testimony on the point of cost recovery of the accommodation vessel) had in fact, before his oral testimony at the hearing, submitted an exhibit with his witness statement a letter from PETRONAS confirming its approval to the respondent for an extension of the accommodation vessel for the period up to 31 August 2014.

[140] Despite being aware of the respondent's cost recovery arrangement with PETRONAS as early as in the pleadings phase, the appellant did not at any time throughout the arbitration request for documents, including during the document production phase (which was right after the pleadings phase), in respect of the appellant's allegation of double recovery concerning the respondent's claims for accommodation vessel. The only requests for

documents during the document production phase were with regard to the arrangement with PETRONAS specifically and limited to the appellant's claim for variation works (where the approval of PETRONAS in respect of certain parts of the appellant's claim for variation works was an issue in dispute).

[141] At all times, the appellant did not make any request for any documentation in regard to any cost recovery of the respondent's work done claims. Nor did the appellant make any application to the for an order of production of documents after the phase of witness statements (including documents exhibited together with such witness statements), during which the respondent's witness had submitted the exhibit on PETRONAS' letter of approval on the cost recovery of the accommodation vessels by the respondent, as stated above.

[142] In fact, the evidence clearly demonstrated that the appellant did have a full opportunity to present its case. In particular, the appellant raised its contention of double claiming on the cost recovery of the accommodation vessel in its written closing submissions.

[143] After the written closing submissions, the had sought further information from the parties on the issue of double recovery. The appellant had provided further submissions on the purported double recovery issue and stated in the further submissions that it was not suggesting a further evidentiary hearing but merely urging the arbitral tribunal to disregard the respondent's submissions on the issue:

> 46. For the avoidance of doubt, the Claimant is not suggesting a further evidentiary hearing on this issue, but is urging the Arbitral Tribunal to disregard the Respondent's submissions on this issue, specifically at the following paragraphs of the Respondent's submissions:
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> (i) The Respondent's Closing Submissions, paragraphs 548 to 551; and
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> (ii) The Respondent's Further Submissions, paragraph 61.
>
> 47. The Claimant expressly reserves its rights on the issue of the new arguments, documents and issues relating to the PSC and JVA raised by the Respondent.

[144] Accordingly, I agree with the respondent that it is therefore simply incorrect for, and unfair of, the appellant to now aver that it had been deprived of its full opportunity to present its case, when the appellant did do so and stated on numerous occasions (in its further submission and cost submission) its acknowledgement that it had done so.

[145] In truth, the did specifically consider the issue of disclosure in its award and had in this regard specifically decided that in relation to the appellant's assertion that PETRONAS may have borne the accommodation vessel costs under the PSC, any recovery against the appellant would amount to double recovery by the respondent and the appellant's seeking to rely on some form of fraud or failure to make disclosure, '[t]he Tribunal firmly rejects allegations of fraud or failure to make disclosure'.

[146] Accordingly, the appellant's contention that it was limited to the evidence obtained during the cross-examination at the arbitration due to the non-production of the PSC is wholly without any merit and if at all, was a result of the appellant's own omission and or failure to seek the production of the PSC.

[147] Quite plainly, it is the alone that would and could decide on the evidence placed before it by the parties in the proceedings. It was wholly within the 's remit to 'reject' the respondent's witness's admission that it had already recovered its AV costs 'based on [its] evaluation of all the evidence adduced contextually'. The is the final arbiter of facts and as correctly found by the learned High Court judge, there was no denial of natural justice occasioned by the non-disclosure of the PSC contract at all.

DOUBLE RECOVERY

[148] Anchoring on the same contention of double recovery but this time from the perspective of breach of public policy, the appellant contended that the 's decision in allowing the respondent's recovery of the accommodation vessels costs, in light of the respondent's own witness's admission of recovery from PETRONAS renders the award to be in breach of public policy since the outcome of the award was to sanction a double recovery by the respondent for the costs of the AVs.

[149] The contention is that an arbitral award which permits a double recovery is in breach of public policy and, for that reason, it is liable to be set aside.

[150] In *Johawaki Development Sdn Bhd v Majlis Agama Islam Wilayah Persekutuan and another summons* [2020] MLJU 660 at paras [142]–[144], the

High Court held that 'where an arbitral award allows for double recovery, and this incontrovertibly goes against the cardinal principle of justice and morality which disallows such double recovery, then the enforcement of the award would not be allowed as it is contrary public policy'.

[151] Similarly, in *Indian Farmers Fertiliser Cooperative Ltd v Gutnick* [2015] VSC 724 at para [107], the Supreme Court of Victoria in Australia held that where an award allows for double recovery: It would render the enforcement of such an award 'contrary to public policy' and fundamental principles of justice and morality may be engaged as 'a claimant cannot recover more than has been lost'.

[152] The Federal Court case of *Jan De Nul (M) Sdn Bhd & Anor v Vincent Tan Chee Yioun & Anor* [2019] 2 MLJ 413 held at paras [55]–[58] as follows:

> [55] ... in applying the concept for the purpose of setting aside an award under s 37 of the AA 2005, the concept of public policy ought to be read narrowly and more restrictively. *The court's intervention should be sparingly used. The court must be compelled that a strong case has been made out that the arbitral award conflicts with the public policy of Malaysia.* As clearly stated by the Court of Appeal in *Sigur Ros* (with which we agree):
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> > The concept of public policy must be one taken in the higher sense where some fundamental principle of law or justice is engaged, some element of illegality, where enforcement of the award involves clear injury to public good or the integrity of the court's process or powers will be abused.
>
> [56] *Even though the court finds* that a breach of the rules of natural justice has been established or *that an arbitral award is in conflict with the public policy under s 37 of the AA 2005, it does not necessarily mean that the award must be set aside as a matter of course.* The power of the court to set aside an award under s 37 is discretionary and will not be exercised automatically in every case where the complaints are established
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> ...
>
> [57] The court must evaluate the nature and impact of the particular breach in deciding whether the award should be set aside under s 37. *The court must also consider the background policy of encouraging arbitral finality and minimalist intervention approach to be adopted in line with the spirit of UNCITRAL Model Law. The effect of ss 8, 9, 37 and 42 of the AA 2005 is that the court should be slow in interfering with or setting aside an arbitral award. The court must always be reminded that constant interference of arbitral award will defeat the spirit of the AA 2005 which for all intent and purposes, is to promote one-stop adjudication in line with the international practice* ... In this regard, the court needs to recognise the autonomy of the arbitral process by encouraging finality; and its advantage as an efficient alternative dispute resolution process should not be undermined.
>
> [58] *The scope of public policy ground for setting aside an arbitral award could only be invoked in deserving case ie in instances where it appears a violation of the most basic*

notions of morality and justice. It covers fundamental principles of law and justice in substantive as well as procedural respect. Instances where the upholding of an arbitral award would shock the conscience, or clearly injurious to the public good, or wholly offensive to the ordinary reasonable and fully informed member of the public, had been held by courts in various jurisdiction to fall within the category of public policy ground for setting aside an arbitral award ...

[153] The appellant's contention based on s 37(1)(b)(ii) is, of course, premised on the assumption that there was indeed double recovery in respect of the accommodation vessel costs awarded by the to the respondent. This, however, was not the case at all.

[154] In reaching its conclusion that there was no double recovery, the found, after having heard the evidence and the parties' submissions on this matter, that the question of how costs are dealt with as between the respondent and PTRONAS under the PSC did not prevent the respondent from making a recovery of costs for which the appellant is liable under the contract. In this regard, the Tribunal further concluded that 'the accounting procedures between SSPC and Petronas do not affect GKL's liability to SSPC under the Contract'.

[155] The finding by the arbitral tribunal on the lack of double recovery, in fact, reflects the respondent's position, as set out in the pleading phase, which is that any compensation received from the appellant will be taken into account in cost recovery from PETRONAS, and there is therefore no double recovery.

[156] For a public policy challenge under s 37(2)(b)(ii) to succeed, the award must offend fundamental notions of justice and morality. Here, the had examined the very issue of whether the respondent was allegedly barred from claiming and or was to be compensated elsewhere, and the had concluded in the negative. That conclusion, even if debatable, does not meet the high threshold for contravening public policy.

[157] Unless the appellant could prove by hard evidence that the respondent in fact recovered the same costs from PETRONAS (rather than merely having the potential to do so), the allegation remains speculative. The issue of whether or not there is double recovery is a question of evidence and fact, and or application of law for the . Any alleged error in its determination of the evidence and or facts and or application of the law does not fall within the limited categories stipulated in ss 37 or 39 of the AA 2005.

[158] Quite clearly, the appellant is, in its setting aside appeals, trying to reopen and rehash the substantive arguments on issues already heard and determined by the , and this cannot be permitted. Again, in this regard, this

court finds that the learned High Court judge was correct again when he found that 'the Tribunal plainly made a conclusive finding of fact that there would be no double recovery by SSPC for the costs of accommodation vessel and this again must now be incapable of review by the court based on trite appellate case laws'.

ARBITRARY APPORTIONMENT QUANTUM OF AWARD WAS DETERMINED IN BREACH OF NATURAL JUSTICE AND/OR IN EXCESS OF JURISDICTION

[159] In respect of the accommodation vessels costs, the respondent had claimed all its accommodation vessels costs from the appellant, whilst the appellant had opposed this on the basis that the respondent had failed to draw a causative link between the accommodation vessels costs incurred after February 2014 and the defects remediation works for which the appellant was liable.

[160] The in its award had awarded the respondent 70% of the accommodation vessels costs post-February 2014 claimed. The appellant complained that it was not given any opportunity to lead evidence or make submissions on the percentage of the accommodation vessels costs for which the had awarded that it should be liable. The appellant further contended that in awarding 70%, the also decided on a matter not argued before them.

[161] Further or alternatively, the appellant contended that the award in this respect was in excess of jurisdiction because the failed to assess and determine an issue that it was constituted to resolve on the basis of findings of fact and law.

[162] More specifically, the appellant contended that, having stated that a proportion had to be determined and yet failing to analyse the appropriate proportion in fact and in law, the was doing 'rough justice' to arrive at a resolution for the parties. Such a method of resolution, namely, not based on discernible findings of fact or law, was a process of decision-making based on equity and conscience as plainly prohibited by s 30(4A) of the AA 2005 in the absence of the parties' authorisation and in excess of jurisdiction.

[163] Clearly the thrust of the appellant's grievance in this case is that the had determined and awarded to the respondent 70% of its total claims for the accommodation vessels costs and not rejecting the same in its entirety as the appellant had contended.

[164] In this regard, it is instructive to refer to what the Court of Appeal in the case of *Tune Group Sdn Bhd & Ors v Padda Gurtaj Singh and another appeal* [2023] 6 MLJ 345 held at para 38:

[38] Moreover and in any event, we find and hold that *the arbitrator need not have to slavishly decide based on the exact pleas of the parties so long they are within the cause of action pursued.* We find that the cause of action here has all the time been maintained by PGS as breach of the concluded contract for non-transfer of the shares by TG & Others to PGS. We are fortified by the Singapore Court of Appeal case of *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR 86 where VK Rajah JA held as follows with emphasis added by us:

> *It is almost invariably the case that parties propose diametrically opposite solutions to resolve a dispute. They may expect the arbitrator to select one of these alternative positions. The arbitrators, however, is not bound to adopt an either/or approach. He is perfectly entitled to embrace a middle path (even without appraising the parties of his provisional thinking or analysis) so long as it is based on evidence that is before him. Similarly, an arbitrator is entitled indeed, it is his obligation, to come to his own conclusions or inferences from the primary facts placed before him. In this context, he is not expected to inexorably accept the conclusions being urged upon him by parties, neither is he expected to consult the parties on his thinking process before finalizing the award unless it involves a dramatic departure from what has been presented to him.*
>
> Each case should be decided within its own factual matrix. It must always be borne in mind that i*t is not the function of the court to assiduously comb an arbitral award microscopically in attempting to determine if there was any blame or fault in the arbitral process; rather an award should be read generously such that only meaningful breaches of the rules of natural justice that have actually caused prejudice are ultimately remedied.*

[165] To my mind, it must have been within the contemplation of the parties and indeed wholly within their expectation that the may come to conclude that only a proportion of the respondent's total claims would be allowed. This was never a case where, under the contract or the parties' pleadings where the is confined to a strict binary choice of all or nothing in awarding damages. The 's function is to assess the evidence and the legal submissions and to determine which part of the claims is proven. It is totally within the scope of the arbitral tribunal to determine any amount between the sums claimed by the parties. Accordingly, quite clearly, the reduction or moderation of the quantum of damages of the sum claimed is not in excess of jurisdiction but is part of the 's fact-finding function.

[166] As regards the rule of natural justice, this requires that each of the parties be given a fair hearing and opportunity to present its case and respond to the other's case. The 's decision to reduce or moderate the quantum of damages claimed based on evidence and arguments ventilated during the arbitral proceedings is not a breach of natural justice.

[167] This is not a case where the had invented a wholly new methodology or basis for the reduction without allowing the parties to comment at all. Neither is this a case where the had relied on extraneous evidence which was

never put to the parties in holding that only 70% of the respondent's claims are allowed.

[168] Further, as regards the contention that by awarding 70% of the respondent's total claims, the had breached s 30(4A) of the AA 2005 because the parties in this case had not expressly authorised the to decide according to equity and conscience, the short and simple answer to this is that the in deciding that only a portion of the damages claimed by the respondent has been proven, was *not* deciding in accordance with equity and conscience at all but was acting based on a fact and legal assessment of the evidence and submissions presented.

[169] I agree with the learned High Court judge that 'the act of the Tribunal adjusting thereby reducing SSPC's claim in the assessment of damages is in any event neither an act of equity and conscience nor failure to decide in accordance with the Contract'.

[170] Indeed, there was no arbitrary assessment on the part of the as contended at all. Adjustment of quantum or amounts to be awarded is well within the discretion and jurisdiction of the Tribunal. The learned High Court judge has correctly referred to the direct access agreement, whereby the parties had agreed that the would be given full access to the quantum experts for the purposes of computation or performing calculations (see: para 75 of the grounds of decision). This is notwithstanding that quantum and assessment of amounts to be awarded are matters within the jurisdiction and ambit of the arbitral tribunal; the arbitral tribunal does not have any obligation to consult the parties or the quantum experts on its determination of the amounts or quantum to be awarded.

[171] The learned High Court judge is further correct to make the following findings regarding the appellant's contentions on the breach of s 30(4A) of the AA 2005, namely, that:

(a) 's 30(4A) of the AA is inapplicable by reason that it was only introduced in May 2018 via Arbitration (Amendment No 2) Act 2018 after the arbitral proceeding had commenced on 2 September 2016'; and

(b) 'the material date is the date of commencement of the arbitral proceeding by the Tribunal wherein s 30(4A) of the AA is not yet in force'.

[172] In this case, both the appellant and the respondent had agreed that the law applicable to the arbitration proceedings is the AA 2005, as amended by the Arbitration (Amendment) Act 2011. Section 30(4A) of the AA 2005 was an amendment which came into force in May 2018 vide Arbitration

(Amendment No 2) Act 2018, after the arbitration proceedings had commenced on 2 September 2016.

[173] The general rule is that statutes, particularly amending statutes, are prima facie prospective and retrospective effect is not to be given to them unless by clear words of necessary implication. The Federal Court case of *Tenaga Nasional Bhd v Kamarstone Sdn Bhd* [2014] 2 MLJ 749 at para 5.

[174] On this point, the appellant had sought to rely on the High Court decisions in *AMDAC (M) Sdn Bhd v BYD Auto Industry Co Ltd* [2020] 11 MLJ 281 and *Tokio Marine Insurans (M) Berhad v Hi-Poly Industries Sdn Bhd* [2020] MLJU 1446; [2020] 1 LNS 1477 where in the former case, Justice Nantha Balan J (as he then was) held that the repeal of s 42 of the AA 2005 affected all arbitration awards issued after the coming into force of the amending statute, even if they had been *commenced prior to* that date. In the latter case, Justice Darryl Goon (as he then was) whilst holding that the repeal of s 42 of the AA 2005 was prospective, nevertheless opined that the said section would be applicable at the time when the arbitral award is issued.

[175] According to learned counsel for the appellant, in either case, assuming that s 30(4A) is to be similarly interpreted, the said section will be applicable to the present arbitration proceedings since the award was issued *post* the amendment.

[176] However, as observed above, this is not a case where the had acted based on equity and conscience at all.

COMMON COSTS

[177] In the arbitration, the respondent claimed that due to the alleged defective nature of the Semi-FPS, certain costs had to be incurred in order to carry out defect remediation works on the Semi-FPS. These costs were common to all defects and SSPC was unable to allocate the costs specifically to any particular work scope. The Parties' quantum experts described these costs as 'Common Costs'.

[178] Common Costs were categorised into:

(a) Category H Common Costs (Time-Related) ('time-related common costs'); and

(b) Category I Common Costs Remedying Defects ('non time-related common costs').

[179] The appellant contended that in determining the respondent's claim

for Common Costs, the arbitral tribunal acted in breach of natural justice, in breach of public policy, and or in excess of jurisdiction in three respects:

(a) firstly, the arbitral tribunal sanctioned a double recovery by awarding Time-Related Common Costs in respect of the delay up to February 2014, notwithstanding that it had held that delay in that period was covered by liquidated damages under the contract and could not be the subject of delay damages ('the double recovery issue');

(b) secondly, the failed to assess the relationship of the respondent's Common Costs claims to defects remediation works according to the method of assessment that it had resolved to apply, and on which the appellant had based its submissions ('the causation issue'); and

(c) thirdly, the awarded an arbitrary 50% reduction for two heads of Non-Time Related Common Costs — on which parties were not given reasonable notice or opportunity to submit, and which was in manifest disregard of the applicable terms of the contract and principles of applicable law ('the arbitrary apportionment issue').

[180] Each of the issues shall be considered in turn.

DOUBLE RECOVERY ISSUE

[181] In relation to the Time-Related Common Costs, the appellant contended that the had unjustifiably awarded the respondent a double recovery which it is contended is in breach of public policy.

[182] The decided that, as the general approach for Time-Related Common Costs, the respondent is entitled to recover the time-based costs during the period of critical delay caused by the defect remediation works where this is appropriate for the given head of claim.

[183] However, the appellant contended that the had also determined, with regard to respondent's accommodation vessels costs, that the respondent is not entitled to claim unliquidated damages for delay *prior* to February 2014 as such damages are only recoverable as liquidated damages under the contract. More specifically at para [3175] of the award, the stated thus:

> SSPC is not entitled to claim unliquidated damages for delay in terms of the use of the AV up to February 2014 because such delay damages are only recoverable as Liquidated Damages.

[184] The had decided that the delay up to February 2014 was not caused by defects but was simply a delay in relation to Handover Completion and one that would be covered under the LAD clause of the contract (ie, cl 37). Given

this finding, the appellant contended that it must follow that an adjustment of the same should have been applied in the evaluation of the Time-Related Common Costs for delays up to February 2014. By not applying such an adjustment, the permitted a double recovery by awarding the unadjusted amount on top of the award for liquidated damages.

[185] Further or alternatively, the appellant contended that this unadjusted award of Time-Related Common Costs was manifestly incoherent given the 's clear statement of the exclusion of delay damages up to February 2014, and its failure to follow through with this logic in relation to the Time-Related Common Costs. This was a breach of natural justice in that the unadjusted amount was an assertion that manifestly departed from the 's very own findings on the evidence. Following the outcome in the Singapore Court of Appeal case of *BZW & Anor v BZV* [2022] SCD 9; [2022] SGCA 1; [2022] 1 SLR 1080 where the arbitral award had been manifestly incoherent, it is submitted that the appellant had not been accorded a fair hearing.

[186] At the outset, I agree with the holding by the learned High Court judge that the Double Recovery Issue raised by the appellant is without any merits. More specifically, the learned High Court judge found that:

(a) they were 'not satisfactorily demonstrated … in detail that this actually occurred'; and

(b) 'the Tribunal was in fact cognisant of that danger of double recovery' and 'therefore do not find it likely that there was double recovery'.

[187] Indeed, apart from mere assertions, the appellant has not been able to show *any* instant of double recovery in respect of the claims that the had awarded under the Time-Related Common Costs at all.

[188] Further, it certainly cannot be said in this case that the award for the Time-Related Common Costs was manifestly incoherent as contended. It is trite that error of law or fact, even serious ones, are not grounds for setting aside. The court will intervene only where the award is so illogical, incoherent or contradictory that it shows that the arbitral tribunal did not genuinely perform its adjudication function or deprived the parties of fair hearing.

[189] In the instant case, in coming to its award on the claims for the Time-Related Common Costs, it has not been shown at all that the 's award is internally contradictory, wholly unsupported by evidence and or based on reasoning never put forth by the parties. As correctly found by the learned High Court judge, the arbitral tribunal was conscious of the danger of double recovery and having considered the evidence and submissions of counsel, did not find any basis for the claim.

THE CAUSATION ISSUE

[190] It is a basic principle of law that losses must be proven to be caused by another party if they are to be recovered from that party. The appellant had made the point in the arbitration that the respondent was unable to prove large sections of its Common Costs claims, as required by article 5A of the contract, pursuant to which the respondent had to demonstrate 'reasonable and properly documented direct costs incurred'.

[191] Essentially, the Time-Related Common Costs are costs of personnel or resources that were prolonged or incurred because of the critical path delay attributable to the defects rectification work carried out on the appellant's defective work. The methodology to compute the Time-Related Common Costs was based on a delay analysis carried out by the appellant and the respondent's respective delay experts.

[192] The Non Time-Related Common Costs essentially means the Common Costs that is dependent on the volume of work, and in this regard are considered work-related costs, with this volume of work being assessed based on available data and records recording work being carried out in remedying the appellant's defective work, and not based on critical delay and hence not time-related.

[193] The quantum experts for both the appellant and the respondent agreed that some heads of claims fell within the categories of both Time-Related and Non Time-Related Common Costs see paras [3092] and [3129] of the award.

[194] The purpose of the quantum experts identifying certain costs as being Time-Related and others Non Time-Related was to enable the assessment of the Time-Related Common Costs as being reasonable and directly based on the outcome of the delay or critical path analysis of the delay experts. the appropriateness of such a delay or critical path analysis methodology to assess the reasonableness and directness of such Common Costs was in fact initially proposed by the appellant in the pleadings phase, where the appellant proposed that based on a critical delay analysis, the reasonableness and properly documented direct costs of such extended resources can then be assessed accordingly:

601. A delay analysis is required to determine whether or to what extent alleged defects caused any critical delay resulting in an extension of the period required for the AVs, if at all. The reasonable and properly documented direct costs of such extended resources can then be assessed accordingly.

[195] Both the appellant's and the respondent's respective quantum experts had initially agreed on a critical delay analysis approach.

[196] In this regard, the resolved at the outset that it would determine whether the Time-Related Costs were attributable to defects remediation works by determining whether the costs were incurred during a period of 'critical delay' caused by a given defect. Crucially, the directed that the appropriateness of this method would be assessed for each Head of Claim, given that not all costs incurred during a delay period would have been for remedial works on the critical path for which the appellant would be liable (see paras [2797]–[2799] of the award):

2797. Whilst the Tribunal considers that, for time-related specific costs, GKL and Mr Breeze have properly identified a potential difficulty with assessing time-related specific costs by applying those costs to the critical delay, the particular circumstances are likely to mean that Mr Prudhoe's methodology can be used to assess the cost of the remedial works for those time-related specific costs. The Tribunal will consider whether, on the facts, assessing those time-related costs by reference to the period of critical delay is appropriate.

2798. The Tribunal also considers that where there are common costs which are time-related they can be related to critical delay where, on the facts of the particular common costs, that is appropriate.

2799. On that basis, the Tribunal will consider the way in which common costs and time-related specific costs and common costs are to be assessed by reference to the facts of the individual Heads of Claim.

[197] However, the appellant contended that in the award, the had proceeded to include certain costs incurred during critical delays in the face of

facts and evidence that this approach was not appropriate, for examples in cases where the charges and fee would have been incurred not just for the defects remediation works or where the costs had no relation to the defects remediation works or costs which would have to be incurred in any event.

[198] Quite clearly, the complaints, even if established, are matters pertaining to errors, if at all, by the in its evaluation of the evidence and quantum, which falls directly within the remit of the and do not constitute grounds for setting aside. The courts are not sitting as an appellate forum on the merits, and for this reason, an award cannot be set aside merely because the did in fact make a mistake in its assessment of damages (see: *TNB Fuel Services Sdn Bhd v China National Coal Group Corp* [2013] 4 MLJ 857; *Master Mulia Sdn Bhd v Sigur Rus Sdn Bhd* [2020] 12 MLJ 198; [2020] 9 CLJ 213; *AKN and another v ALC and others and other appeals* [2015] SCD 107; [2015] 3 SLR 488 (SGCA)).

[199] In the present case, it has not been demonstrated that in arriving at the award for the Time-Relation Costs, the had adopted a methodology not submitted or awarded compensation in respect of matters not submitted. In fact, the methodology adopted was proposed by the appellant's quantum expert. The experts then worked together to develop on this suggestion, and all the experts' joint statements and reports issued would show how the experts worked on developing and progressing their approach, which led to the subsequent agreed approach between the parties and the experts on the Time-Related Common Costs methodology. Although the appellant's quantum expert eventually chose not to follow the agreed methodology and instead claimed in his report that the costs could not be analysed and provided a nil assessment, the appellant's quantum expert did not provide an alternative assessment, and consequently, the had only one methodology to consider the evaluation and assessment of the Time-Related Common Costs.

[200] The appellant has also not demonstrated that the , having simultaneously found that certain costs were not causally connected with the defects remediation works, nevertheless had proceeded to award the same, making the award contradictory or inherently incoherent. The complaints that the wrongly included certain costs because these costs were inevitable, unrelated or had mixed or overlapping purposes cannot be a basis for setting aside as they are merely merits issue. There is no basis under ss 37 and 39 of the AA 2005 for the appellant to rehash such contentions in its setting aside applications and now in these setting aside appeals.

THE ARBITRARY APPORTIONMENT ISSUE

[201] The complaint here relates to the Non Time-Related Common Costs claimed by the respondent which were mainly for manpower costs that the respondent had incurred to carry out defects remediation works.

[202] The appellant had contended before the that the method adopted by the respondent's quantum expert, Mr Prudhoe was flawed and unreliable. In determining whether the methodology adopted by Mr Prudhoe was reliable, the agreed that Mr Prudhoe's analysis was, in principle, a sound basis for allocating the appellant's manpower to various other categories. However, the arbitral tribunal had also stated that it 'considers that GKL has properly identified weaknesses in the way the method of analysis has been applied' (at para [2755]).

[203] The then proceeded to note that the methodology adopted was open to potential misallocations and errors that require certain adjustments to properly determine the recoverable costs. The also noted that the adjustment was necessary in light of the fact that 'not all defects have been established to be GKL's responsibility' (see para [2757] of award).

[204] In light of the aforesaid, the considered that any figure produced by Mr Prudhoe using the methodology above ought to be reduced by 50% to take into account the two factors above.

[205] The appellant contended that in making this adjustment, the had acted in breach of natural justice as it failed to allow parties and or the parties' quantum experts to address the 50% adjustment adopted by the . Before the issuance of the award on 8 April 2020, the had not made any indication to the parties that it was considering adopting a 50% adjustment for the Non Time-Related Common Costs claims. The only mention of the 's adoption of the 50% adjustment before the award was made to the parties' quantum experts in the 's communication to the quantum experts dated 1 February 2020, where it was stated:

40. The Tribunal finds that, the recoverable non-time related cost element of Head of Claim 21, the General Work-Related Costs can, as Mr Prudhoe has done, be assessed by using the percentages derived from the CSU manpower but that only 50% of the figures which are derived by Mr Prudhoe from that method of analysis are recoverable.

41. The Tribunal finds that the recoverable non-time related element of Head of Claim 22 relating to the GKL sourced manpower working on the rectification of defects can, as Mr Prudhoe has done, be assessed by using the percentages derived from the CSU manpower but that only 50% of the figures which are derived by Mr Prudhoe from that method of analysis are recoverable.

[206] The appellant contended that since neither party had the opportunity to make submissions in relation to the 50% adjustment, the appellant was deprived of a 'fair and reasonable opportunity' to answer or refute the application of such an adjustment, which had a direct impact on the quantum assessment of the Non Time-Related Common Cost claim.

[207] It was further contended by the appellant that the 's approach of making an arbitrary 50% adjustment to account for deficiencies in the respondent's case (instead of dismissing it altogether or putting these deficiencies to the parties so they could be addressed) is akin to the 's 'flexible' approach to damages in *CEF & Anor v CEH* [2022] SCD 298; [2022] 2 SLR 918; [2022] SGCA 54. Like the parties in that case, it was submitted that the appellant (and the respondent) had no notice that such an approach would be adopted. Instead, both parties had put their cases on the understanding that the would only award compensation for losses (or costs) that could be proved. The parties had no reasonable notice that the was considering a *level of adjustment* to the costs — which had not been sought by either party — and therefore did not have the occasion or opportunity to submit on the same. Accordingly, it was contended that the 's determination of Non Time-Related Common Costs breached the fair hearing rule and natural justice.

[208] The appellant's contentions here are similar to those made in relation to the 's decision to award 70% of the claims by the respondent for its claims for the accommodation vessels costs, which have been dealt with above.

[209] The has latitude to assess damages (even imperfectly) where the precise quantification is impractical or impossible, provided the methodology is grounded in the evidence and submissions made before it. The courts are generally deferential to arbitral tribunals where they make evaluative judgments that involve accepting part of the expert's evidence and assessing the credibility of the testimonies and evidence. It is axiomatic that the assessment of damages is not an exact science and determined with mathematical precision.

[210] In the instant case, the had expressly stated in paras [2755]–[2758] its reasonings for attributing the 50% apportionment of the claims for the Non-Time Related Common Costs. The had accepted Mr Prudhoe's method of analysis as sound in principle for the allocation of the appellant's manpower to the various categories of Base Scope, Carry On, Appendix A, and Defects. The , however, also recognised that the appellant had properly identified weaknesses in the way in which the method of analysis had been applied. In the end, the determined that 'an adjustment needs to be made to ensure that the figure awarded is no more than the properly recoverable costs. The further '*found that not all the defects have been established to be GKL's responsibility.* It was based on the above that the *considers that the figures produced based on Mr Prudhoe's analysis should be reduced by 50% to take account of those two elements.*

[211] Hence, this is clearly a case where the had provided its reasons and explanation as to why it had moderated or discounted the respondent's claims for the Non Time Related Common Costs. This is certainly not a case where the did not explain at all or where the reasons are inherently contradictory, rendering the same manifestly incoherent. Further, the determination was based on the methodology and submissions made by the parties, which means that there is no breach of natural justice nor excess jurisdiction at all. Whilst arguably the reasons stated may be brief, this, if at all, is a matter going to the quality of reasoning, which is a merit issue.

[212] It is accepted that the quantification of damages is not an exact science. This is echoed by the Federal Court in the case of *Pancaran Prima Sdn Bhd v Iswarabena Sdn Bhd and another appeal* [2021] 1 MLJ 1; [2020] 9 CLJ 466, where the Federal Court held:

> [54] Having asked himself the right question, ie, 'has the claimant proved his loss of profit in the legal sense of on the balance of probability?', *the learned arbitrator went on, based on the material before him, to make a firm finding of fact that the appellant had proved its loss of profit except that the sum claimed was neither fair nor reasonable, hence his decision to award a lower figure but without acceding to the respondent's contention that the appellant was only entitled to nominal damages.*
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> ...
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> [62] In awarding a loss of profit of 10% for the remaining drainage works and 7.5% for the remaining vehicular box culvert, *the arbitrator was in fact moderating the appellant's claim of 25%* by reducing it for contingencies, albeit taking the 10–15% margin for P&A which he described as 'almost the norm' in the Malaysian construction industry.
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> [63] *Obviously, what the learned arbitrator did was to strike a balance between the high and the low of the quantum for loss of profit. He did not slavishly apply the 10–15% 'norm' but only allowed for a lower range. We agree with learned counsel for the appellant that this is what arbitrators are expected to do.*

A [64] What is also clear from the award is that in determining the quantum of loss of profit, the learned arbitrator found the respondent's evidence to be of little value but at the same time he considered the quantum claimed by the appellant to be excessive. That was the reason why, as we just mentioned, he brought the appellant's claim down from 25% to 10% for loss of profit for the remaining drainage works and 7.5% for the remaining vehicular box culvert (provisional quantities) works.

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[99] In the context of the present case, we do not think that the drawing by the arbitrator on his own knowledge and expertise of the 10–15% no-risk profit margin for P&A as being 'almost a norm' in the Malaysian construction industry was something that was not reasonably foreseeable or was a significant surprise to the respondent, so much so that the failure by the learned arbitrator to give it the opportunity to submit on the issue had resulted in a serious breach of the rules of natural justice. While it is true that the arbitrator was not expected to know everything about the norms in the Malaysian construction industry, neither is he expected to know nothing at all.

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[106] ... As we have pointed out earlier in this judgment, the learned arbitrator on the evidence before him was prepared to rule that the appellant had successfully made out its case for a 25% profit but because of the contingencies, he reduced it to 10% and 7.5% respectively.

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[107] *We must not lose sight of the reality that quantification of loss of profit is not an exact science and is the arbitrator's remit ...*

[108] Given the evidence before the arbitral tribunal, the question of the arbitrator having relied on 'extraneous evidence' which he 'invented' or 'thought up' of the 10–15% no-risk profit norm for P&A in the Malaysian construction industry as alleged by the respondent does not arise at all. As such, the question of the arbitrator having breached the rules of natural justice by failing to give the parties the opportunity to submit on the norm also does not arise.

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G **[213]** The House of Lords in the English case of *London & North Eastern Rly Co v BA Collieries Ltd* [1945] AC 143 has long ago also held as follows:

In my opinion there is a positive though contingent and future liability expressly imposed if the coal is worked. *Its 'value' is left to the arbitrator to decide, if the parties do not agree to it.* As with other questions of compensation the code expressly leaves the value to be settled by arbitration, presumably by mining engineers or other experienced and instructed experts in the particular art and science. *They must use their peritiam artis to evaluate the future contingencies and to picture the possibilities which appertain to the underground coal. They may think the risk of damage is too problematical to be given any but a nugatory value or they may value it at a substantial figure. There can be no certainty in such matters but they must do the best they can. Their decision for all practical purposes cannot be questioned. They must be left to decide according to their judgment of what would be done in the usual course of events*, for instance, whether the particular volition or decision of the mine manager in the natural course of events would be that the seam should be worked at all, or if worked, when it would be worked, and so on. The problem is not unlike the

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problems which constantly arise at common law in estimating damages, for instance, damages for breach of contract or for tortious acts. These damages often have to be based on future probabilities which may include consequences such as the choice or volition, however capricious, of third parties.

[214] Accordingly, I will not revisit the issue.

SPECIFIC MINOR COSTS

[215] In the arbitration, the respondent claimed against the appellant for the costs of rectification of specific systems. These were described as 'Specific Minor Costs'. The total value of the respondent's Specific Minor Costs claim was USD181,833,738, of which USD117,263,116.87 was awarded to the respondent.

[216] In determining part of the respondent's claims for Specific Minor Costs, the appellant contended that the acted in breach of public policy and or exceeded its jurisdiction by applying a methodology of 'sampling and extrapolation' to decide which categories of costs were proven and were to be awarded. For these Specific Minor Claims using the 'sampling and extrapolation' method, the awarded a sum of USD6,074,228.37.

[217] The method of 'sampling and extrapolation' involved three elements:

(a) firstly, sampling — the analysis of results arising from the assessment of agreed representative samples with sufficient commonality within a category;

(b) secondly, extrapolation — the application of the results of the sampling process to other heads of claim which were not analysed at all, where the application of the results from other categories was purportedly justified by common liability, technical, or other issues which may assist in resolving the unanalysed claims; and

(c) third, the 80:20 principle — the application of the principle that 80% of the value of the claim should be identified and determined, whereupon the remaining 20% in value of the claim can be determined without analysis by imposing the results that arose from the analysis of the 80%.

[218] Although the had rejected the general application of the sampling and extrapolation method for the Work Done Claims, the accepted this method for Specific Minor Claims amounting to USD6,074,228.37.

[219] The appellant contended that the 's method of determining the respondent's Specific Minor Claims permitted the respondent's recovery of costs without providing full or adequate proof of any link between certain

claimed costs and the underlying defects remediation works. The 'sampling and extrapolation' method of determining the Specific Minor Claims was in breach of public policy in that the appellant was ordered to pay a sum of USD6,074,228.37 in costs to the respondent without these specific sums being shown to be attributable to the respondent. The appellant contended that such an order being made, which is binding and enforceable against the appellant, is a matter of concern for the public interest. In its violation of the principle of causation, this award is manifestly unconscionable and wholly offensive to an ordinary, reasonable, and fully informed member of the public. It cannot be left undisturbed where it is now before this court under s 37(1)(b)(ii) of the AA 2005.

[220] Further, in determining the respondent's Specific Minor Claims using this method, the exceeded its jurisdiction in that the awarded costs to which it had not applied its mind, and which were not based on any finding of fact on the proof of those costs.

[221] It was further said that the exceeded its jurisdiction in that its process of determination was in manifest disregard of the terms of the parties' agreement and the applicable substantive law, rendering it a decision-making process which breached s 30(5) of the AA 2005.

[222] In addressing the appellant on the Specific Minor Costs claims, upon scrutiny of the award, it would appear that the at para [2495] of the award had made it abundantly clear that 'its findings in relation to the Work Done Claims were limited to the findings which it has made on the particular Examples in the four categories, with the extrapolation only in respect of particular findings by the Technical Experts but without general extrapolation to the remaining claims'.

[223] Indeed, in the preceding para [2494], the held that 'with the exception of the Technical Experts' findings dealt with below, there is no basis for it to either adopt a sampling basis by applying findings on an Example or a number of Examples to the remaining claims.'

[224] In fact, the sum of USD6,074,228.37 that was awarded to the respondent for the Specific Minor Costs claim was never based on the 'sampling and extrapolation' methodology at all. At paras [2496] and [2497] of the award, the then dealt with the claims amounting to USD6,074,228.37 by referring to the Technical Experts' Third Joint Statement and held that 'the Technical Experts found that certain minor defect claims could be directly resolved based on the findings which they made in relation to the particular Examples. The therefore finds that the relevant categories of defect should also include the costs relating to the following claims which the technical experts

found were similar to and could be assessed under the results of existing examples.

[225] The after referring to the piping system and piping construction issues and the faulty equipment/materials claims and to the existing examples finally determined at para [2498] that '[t]he quantum experts have agreed the value of these agreed samples and in the light of the findings of this Tribunal on liability have calculated that there are Specific Costs of USD6,074,228.37 ...'.

[226] In any case, even if the had relied on the 'sampling and extrapolation' methodology in coming to its award of USD6,074,228.37 for the Specific Minor Costs claim, the award is also not susceptible to being set aside on this ground. This is because the 'sampling and extrapolation' methodology was clearly within the scope of the evidence and submissions before the arbitral tribunal. The parties were allowed to comment, and they, their technical experts, and the were already discussing the extrapolation method, among others, before the issuance of the Procedural Order No 2 dated 21 March 2018. Accordingly, there was no breach of natural justice or the acting in excess of its jurisdiction at all.

[227] In fact, even at the appellant's best case, the had relied on the technical experts who had only applied limited extrapolation on a jointly agreed basis to no more than the Minor Specific Costs Claims which the tribunal adopted and awarded to the respondent.

[228] For the above reasons, I also find no merit to the appellant's contentions on the Specific Minor Claims issue.

PRE-EMINENCE OF ARBITRAL TRIBUNAL

[229] Before concluding, there is a matter which I must comment upon. There is no question that in this case, the members of the arbitral tribunal comprised all highly esteemed leaders who are experienced in the field of construction arbitrations. They were:

(a) Prof Doug Jones is a professionally qualified lawyer and experienced arbitrator in construction and infrastructure disputes. He is a member of the CIDC (Construction Industry Development Council) International Advisory Group, India Construction Industry;

(b) Sir Vivian Ramsey is a professionally qualified engineer, economist, and lawyer. He is a Chartered Engineer, a Fellow of the Institute of Civil Engineers, and a Fellow of the Royal Academy of Engineering. He also practiced as a barrister, became a Queen's Counsel, an arbitrator, and is a retired judge of the Queen's Bench Division and also the Technology and

Construction Court in London; and

(c) Dr Robert Gaitskill is also a professionally qualified engineer and lawyer. He is a Chartered Engineer, a Fellow of the Institute of Engineering and Technology, a Fellow of the Institute of Mechanical Engineers, and a former Senator of the Engineering Council. He has wide experience as an engineer in, among others, oil rig design, and has been appointed and acted as an expert determinator (as a qualified and Chartered Engineer).

[230] There was a suggestion by learned counsel for the appellant that the learned High Court judge may have given too much deference to the pre-eminence composition of the arbitral tribunal in arriving at his decision to dismiss the GKL's setting aside applications.

[231] With respect, I am unable to accept the learned counsel's submission that the learned High Court judge had accorded undue deference to the arbitral tribunal by reason of its distinguished composition. A careful reading of the grounds of judgment discloses no such suggestion at all. On the contrary, the learned High Court judge had approached the applications by reference to the statutory framework under the AA 2005 and the established principles governing judicial intervention in arbitral proceedings. The reasoning reflects a disciplined adherence to the law, and the conclusions reached were firmly anchored in the facts and issues presented, rather than in any consideration of the 's stature.

[232] To impute to the learned High Court judge an undue deference to the is, with respect, unfounded and does not withstand scrutiny. The judgment reveals that the merits of the complaints were carefully evaluated, and the dismissal of the applications flowed from the absence of grounds warranting judicial interference with the award. In the circumstances, the criticism levelled at the learned High Court judge is both unsupported by the record and unwarranted.

CONCLUSIONS

[233] In the premises and based on the reasonings set out above, it is my judgment that the GKL's setting aside applications are without any merit. The learned High Court judge was correct to find that the appellant had not made out a meritorious case, whether to set aside the award in whole or in part, as the appellant has failed to establish that the acted in excess of jurisdiction and or denied the appellant's natural justice and or made an award that conflicted with the public policy of Malaysia.

[234] As correctly found by the learned High Court judge in para 110 of the

grounds of decision, all the complaints advanced by the appellant are actually its appeal against the award. The appellant is clearly seeking to reopen, rehash, and re-argue the issues in the arbitration before this court. This is not permissible in the circumstances of this case.

[235] Accordingly, the appellant's setting aside appeals are hereby dismissed with costs to be paid to the respondent.

GK's appeal allowed in part and arbitral tribunal's award varied.

Reported by Ashok Kumar